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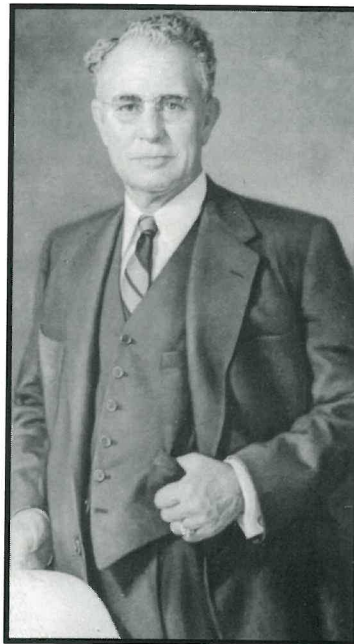
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NOVA LAW REVIEW

**The Leo Goodwin Sr.
Chair in Law
2002 Visiting Professors**



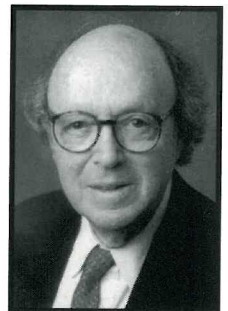
*Media Intrusiveness into Private Lives:
Law and Policy*



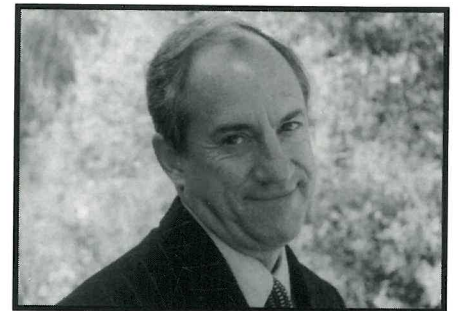
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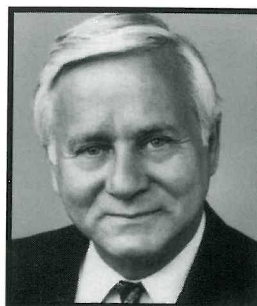
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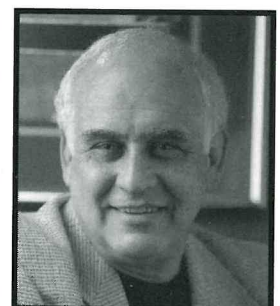
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Privacy and Civilization, an Essay by Anthony Lewis*

Jan Prochazka was a leading dissident during the totalitarian Communist regime in Czechoslovakia. He liked to meet and talk with another dissident friend. The police secretly recorded their conversations. One day, amazingly, the police began broadcasting the tapes on the radio. It was a move to discredit Prochazka. According to the great Czech writer, Milan Kundera, the tactic nearly succeeded. People were shocked because “in private a person says all sorts of things, uses coarse language, acts silly, tells dirty jokes . . . floats heretical ideas he’d never admit in public and so forth.”¹ But gradually, people realized

[t]hat the real scandal was not Prochazka’s daring talk but the rape of his life; they realized, as if by electric shock, that private and public are two essentially different worlds and that respect for that difference is the indispensable condition, the sine qua non, for a

* Anthony Lewis was a columnist for *The New York Times* from 1969 to 2001. He twice won the Pulitzer Prize. He was born in New York City and attended the Horace Mann School in New York and Harvard College, receiving a Bachelor of Arts in 1948. From 1948 to 1952, he was a deskman in the Sunday Department of *The Times*. In 1952 he became a reporter for *The Washington Daily News*. In 1955 he won a Pulitzer Prize for national reporting for a series of articles in *The News* on the dismissal of a Navy employee as a security risk—dismissal without telling the employee the sources or nature of the charges against him. The articles led to the employee’s reinstatement.

In 1955 Lewis joined the Washington Bureau of *The New York Times*. In 1956–57 he was a Nieman Fellow; he spent the academic year studying at Harvard Law School. On his return to Washington he covered the Supreme Court, the Justice Department, and other legal matters, including the government’s handling of the civil rights movement. He won a Pulitzer Prize for his coverage of the Supreme Court in 1963.

He is author of three books: *Gideon’s Trumpet*, about a landmark Supreme Court case; *Portrait of a Decade*, about the great changes in American race relations, and *Make No Law: The Sullivan Case and the First Amendment*.

Lewis was for fifteen years a Lecturer on Law at the Harvard Law School, teaching a course on The Constitution and the Press. He has taught at a number of other universities as a visitor, among them the Universities of California, Illinois, Oregon, and Arizona. Since 1983, he has held the James Madison Visiting Professorship at Columbia University.

1. MILAN KUNDERA, TESTAMENTS BETRAYED: AN ESSAY IN NINE PARTS (Linda Asher, trans., Harper Collins, 1995).

man to live free; that the curtain separating these two worlds is not to be tampered with, and that curtain-rippers are criminals.²

In time, Kundera managed to leave Czechoslovakia for France. There Kundera saw a magazine cover of Jacques Brel, the singer, hiding his face from photographers who had ambushed him in front of a hospital where he was being treated for advanced cancer.³ “And suddenly,” Kundera wrote, “I felt I was encountering the very same evil that had made me flee my country; broadcasting Prochazka’s conversations and photographing a dying singer seemed to me to belong to the same world.”⁴

The reason I have begun by describing these two experiences of Milan Kundera’s is that they provide the setting, and the insight he drew, for one of the most compelling modern statements in support of privacy as a humane value. Kundera said in 1985,

For me, indiscretion is a capital sin. Anyone who reveals someone else’s intimate life deserves to be whipped. We live in an age when private life is being destroyed. The police destroy it in Communist countries, journalists threaten it in democratic countries, and little by little the people themselves lose their taste for private life and their sense of it. Life when one can’t hide from the eyes of others—that is hell. Those who have lived in totalitarian countries know it, but that system only brings out, like a magnifying glass, the tendencies of all modern society Without secrecy, nothing is possible—not love, not friendship.⁵

Kundera saw journalists as the destroyers of privacy in democratic countries, the equivalent of the secret police. And he has a point. He gave a French example. Britain, home of the world’s sleaziest tabloids, is even worse. American supermarket tabloids are ruthless in their exposure of the famous, and latterly their tittle-tattle has often been copied by mainstream newspapers and broadcasters. But the most striking development of recent years in America has been the use of the legal process to expose the inner life of individuals. Kenneth Starr, the independent counsel who tried to drive President Clinton from office, used his menacing power to obtain from Monica Lewinsky’s personal computer her unsent love letters and personal jottings; he printed them out and included them in the report he sent to the

2. *Id.*

3. *Id.*

4. *Id.*

5. *A Talk With Milan Kundera*, N.Y. TIMES, May 19, 1985 (Magazine), at 85.

House of Representatives. He also included, despite her anguished plea, computer messages from a friend of Ms. Lewinsky's in Japan telling about conflict with her husband.

Ms. Lewinsky especially resented a Starr subpoena demanding that a Washington bookstore produce a record of all the books she had bought there. "I felt like I wasn't a citizen of this country any more," she said.⁶ But Starr said courts had upheld a subpoena for records of books read by Timothy McVeigh, the Oklahoma City bomber, so they should do the same for him. That a prosecutor would advance so absurd an analogy shows how the interest of privacy has been devalued in the legal mind.

Jeffrey Rosen's recent book, *The Unwanted Gaze*,⁷ compellingly describes what Rosen subtitles the book, *The Destruction of Privacy in America*. He cites the lawsuit by Paula Jones as an example of how sexual harassment law has been perverted into a destroyer of privacy.⁸ By accusing President Clinton of an offensive sexual advance years before, Jones was able to compel him, and others, to describe their consensual, private sexual activities in testimony that inevitably became public.⁹ Monica Lewinsky was asked by Jones's lawyers to hand over her diaries, address books, letters, notes and so on.¹⁰ Rosen asks, "[H]ow could the law permit such unreasonable searches, in which the investigation of the offense seemed more invasive than the offense itself?"¹¹

We have come a long way in this country, a prurient way, from the modest indignity that helped to provoke Louis D. Brandeis' great defense of privacy: the use of pictures of his law partner's wife, without her consent, in newspapers. Brandeis and his law partner, Samuel D. Warren, invented a legal theory for the protection of privacy in their 1890 article in the Harvard Law Review, *The Right to Privacy*.¹² They used a phrase that rings for us still, "the right to be let alone."¹³

Brandeis was a man of strong and lasting convictions. Thirty-eight years later he used that phrase again, dissenting from the decision of a majority of his Supreme Court colleagues that wiretapping was not a search

6. ANDREW MORTON, *MONICA'S STORY* 215 (1999).

7. JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2000).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

13. *Id.*

subject to the restraints of the Fourth Amendment to the Constitution.¹⁴ He wrote:

The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.¹⁵

The wiretapping decision from which Brandeis dissented has been overruled by the Supreme Court.¹⁶ Tapping of telephones by government agents is now subject to the Fourth Amendment's bar on "unreasonable searches," though that gives the government a good deal of room to define what is reasonable. But otherwise, the interest of privacy has not fared well in the United States. What Kundera described as the curtain between every individual's public and private life is well and truly ripped.

The odd thing is that privacy has suffered despite the adoption of law designed to protect it. For the Brandeis-Warren article has had more effect on law, in all likelihood, than anything else ever written for a law review. Legislatures and courts in most states have made invasion of privacy a tort, just as Brandeis and Warren proposed. Treatises have identified four varieties of the tort: 1) appropriation of a person's name or likeness, like Mrs. Warren's; 2) invasion of one's personal space, as by a concealed microphone in a medical rescue helicopter; 3) a depiction that puts a person in a false light; and 4) disclosure of truthful but embarrassing private facts about a person.¹⁷

But despite all those legal trappings, those grounds for recovery of damages, lawsuits for violation of the right to privacy have not often proved fruitful. In significant cases, judges have found the interest in privacy outweighed by other interests. One of the earliest of those cases, and to me one of the most tormenting, is *Sidis v. F-R Publishing Corp.*,¹⁸ decided in 1940.

14. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

15. *Id.* (Brandeis, J., dissenting).

16. *Katz v. United States*, 389 U.S. 347, 353 (1967).

17. W. PAGE KEETON, ET. AL., PROSSER & KEETON ON TORTS, § 117 (5th ed. 1984).

18. 113 F.2d 806 (2d Cir. 1940).

William James Sidis, born in 1898, was a boy genius.¹⁹ His father, Boris, a psychologist, set out almost from birth to develop the boy's faculties.²⁰ William was said to be reading *The New York Times* by the age of 18 months.²¹ By the time he started school, he knew not only English but was studying Latin and French.²² Boris trained him relentlessly, issuing bulletins on William's progress to the press.²³

At the age of eleven, William entered Harvard, and *The New York Times* described him as the "wonderfully successful result of a scientific forcing experiment."²⁴ But, as anyone might have predicted, William did not enjoy the life forced upon him. After college and incomplete attempts at graduate school, he sought obscurity.²⁵ Working variously as a clerk and a translator, Sidis dropped out of the public eye until 1937, when *The New Yorker* published an article about him by Jared L. Manley.²⁶ The headline was "Where Are They Now?" Under that was the line "April Fool," a play on the fact that Sidis was born on April 1.²⁷ The article described him as living a lonely life in "a hall bedroom in Boston's shabby south end."²⁸ It spoke of his "curious . . . laugh," his collection of streetcar transfers and his interest in the lore of the Okamakamesset Indians.²⁹ It was, as a judge said, a "merciless" exposure of a man who desperately desired to be let alone.³⁰

Sidis sued under state law for violation of his right to privacy.³¹ Because he and the company that published *The New Yorker* were from different states, the case was brought in federal court.³² It was decided in 1940 by the United States Court of Appeals for the Second Circuit, in an opinion by a particularly thoughtful judge, Charles Clark, a former dean of the Yale Law School.³³ Judge Clark expressed sympathy for the plaintiff.³⁴

19. Jared L. Manley, *Where Are They Now*, THE NEW YORKER, Aug. 14, 1937, at 22, as discussed in *Sidis*, 113 F.2d at 807.

20. *Sidis Could Read at Two Years Old*, N.Y. TIMES, Oct. 18, 1909, at 7.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Sidis*, 113 F.2d at 809.

26. *Manley*, *supra* note 19, at 22.

27. *Sidis*, 113 F.2d at 807.

28. *Id.*

29. *Id.*

30. *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 807 (2d Cir. 1940).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 807, 809.

Sidis claimed that *The New Yorker* article had held him up to “public scorn, ridicule and contempt,” causing him “grievous mental anguish [and] humiliation.”³⁵ There was no reason to doubt the truth of those assertions.³⁶ But Judge Clark found for the defendants, the publishers.³⁷ He did not find them protected by the First Amendment. Indeed, he did not mention the First Amendment, for the Supreme Court had not yet brought libel and privacy within its ambit. He simply balanced the interests—Sidis’s in privacy, the society’s in freedom of comment—and said the court was not disposed “to afford to all the intimate details of private life an absolute immunity from the prying of the press.”³⁸ Brandeis to the contrary notwithstanding, Judge Clark said, he would allow “limited scrutiny of the ‘private’ life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a ‘public figure.’”³⁹

“Thrust upon him,” that phrase of Judge Clark’s, is what lost the case for Sidis. To many it may seem unfair—it does to me—that Sidis was more vulnerable to public mocking for the rest of his life because of the fame his father forced upon him. But I suppose it would be strange, in a country as devoted to freedom of expression as this one, to bar the press and the public from taking a continuing interest in someone who had been a publicized boy genius. More recent interpretation of the First Amendment has made that side of the balance even weightier.

Whatever the legal balance should have been when Sidis sued, there are questions of journalistic decision-making. Was the Jared Manley article good journalism? Should *The New Yorker* have printed it? Was it ethical to do so? When I teach the *Sidis* case, I ask my students what other works by Jared Manley they have read. It is a trick question, because Manley did not exist. The name was a pseudonym used by the real author of the Sidis article, who was James Thurber. Another thing: Thurber evidently did not meet Sidis. The article said a woman, unnamed, had “recently succeeded in interviewing him.”⁴⁰ Did she disclose her purpose? Or did she pose as a new friend of the lonely man so that she was invited to visit his hall bedroom and inspect his collection of streetcar transfers? There is a smell of tabloid journalism here that one does not usually associate with *The New Yorker*. Publishing a story that pries brutally into someone’s private life may not give

35. SISSELA BOK, SECRETS 251 (1984).

36. *Id.*

37. *Id.* at 811.

38. *Id.* at 809.

39. *Id.*

40. Manley, *supra* note 19.

the victim a right to damages, but it may nonetheless violate the standards of decent journalism. William James Sidis lived just four years after the Second Circuit decision. Unemployed and destitute, he died of a cerebral hemorrhage.⁴¹

The interest of privacy was first authoritatively weighed against the First Amendment's protection of freedom to publish in a Supreme Court case called *Time, Inc. v. Hill*.⁴² James Hill, his wife, and five children lived in a suburb of Philadelphia.⁴³ In 1952, three escaped convicts took over their home.⁴⁴ The Hills were held hostage for nineteen hours, but were treated respectfully by the convicts, who left and ten days later were caught.⁴⁵ The press covered the story intensely, to the distress of the family and especially of Mrs. Hill, who was a very private person.⁴⁶ To escape from the glare of publicity, the Hills moved to Connecticut and sought obscurity.

Two years later a play called *The Desperate Hours* opened on Broadway. It depicted a two-day reign of terror by escaped convicts who held a family hostage: brutality, sexual threats, and general menace. The play was set in Indianapolis. But *Life* magazine, doing a feature on the opening, photographed the actors in the former home of the Hills near Philadelphia and described the play, with all its terror, as a reenactment of what had happened to the Hills.⁴⁷ The *Life* story was devastating to the Hill family.⁴⁸ Mrs. Hill suffered a psychiatric breakdown.⁴⁹ Mr. Hill said he could not understand how *Life* could publish such a story without at least telephoning him to check the facts.⁵⁰ "It was just like we didn't exist," he said, "like we were dirt."⁵¹

41. See generally Jim Morton, *Peridromophilia Unbound: William James Sidis*, at <http://members.aol.com/popvoid/sidis.html>; John H. Lienhard, *Engines of Our Ingenuity No. 969: William James Sidis*, at <http://www.uh.edu/engines/epi969.htm>.

42. 385 U.S. 374 (1967).

43. *Id.* at 378.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Time, Inc. v. Hill*, 385 U.S. 374, 377–78 (1967).

48. *Id.*

49. *Id.*

50. BERNARD SCHWARTZ, *Unpublished Opinions of the Warren Court* 242, 249–50 (Oxford Univ. Press 1985). See also Leonard Garment, *Annals of Law: The Hill Case*, THE NEW YORKER, Apr. 17, 1989, at 90, 109.

51. SCHWARTZ, *supra* note 50, at 249.

Mr. Hill sued Time, Inc., the publishers of *Life*, for violation of the New York privacy statute.⁵² By associating his family with horrors that it had not in fact experienced, he said, the article put the family in a false light.⁵³ In the New York courts, he won damages of \$30,000.⁵⁴ But Time, Inc. took the case on to the United States Supreme Court, where Mr. Hill was represented by Richard M. Nixon.⁵⁵ After hearing argument on April 27, 1966, the justices voted 6-3 to affirm the Hills' modest judgment.⁵⁶

The opinion was assigned to Justice Abe Fortas.⁵⁷ He began with a stinging attack on *Life*'s handling of the story.⁵⁸ "Needless, heedless, wanton and deliberate injury of the sort inflicted by Life's picture story," he wrote, "is not an essential instrument of responsible journalism. Magazine writers and editors are not, by reason of their high office, relieved of the common obligation to avoid inflicting wanton and unnecessary injury. The prerogatives of the press—essential to our liberty—do not preclude reasonable care and avoidance of casual infliction of injury They do not confer a license for pointless assault."⁵⁹

Justice Fortas went on to speak, eloquently, of the meaning of privacy and its place in a civilized society.

[I]t is of constitutional stature. . . . [I]t is not only the right to be secure in one's person, house, papers and effects, except as permitted by law; it embraces the right to be free from coercion, however subtle, to incriminate oneself; it is different from, but akin to the right to select and freely to practice one's religion and the right to freedom of speech; it is more than the specific right to be secure against the Peeping Tom or the intrusion of electronic espionage devices and wiretapping. All of these are aspects of the right to privacy; but the right of privacy reaches beyond any of its specifics. It is, simply stated, the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living under a government of law.⁶⁰

52. *Time*, 385 U.S. at 374.

53. *Id.*

54. *Id.* at 379.

55. *Id.* at 375.

56. SCHWARTZ, *supra* note 50 at 242.

57. *Id.*

58. *Id.*

59. *Id.* at 243.

60. *Id.*

Powerful words, but you will not find them in the reports of Supreme Court decisions. At the passionate urging of Justice Hugo L. Black, the Supreme Court set the case down for reargument the following fall.⁶¹ And then, by a vote of 5-4, it reversed the judgment for Mr. Hill.⁶² What had happened? Justice Black was the most committed advocate of free expression on the Supreme Court at that time, and very likely at any time in the Court's history. Just before the *Hill* case was reargued, in October, he circulated among his colleagues a biting memorandum on the case.⁶³ "After mature reflection," he wrote, "I am unable to recall any prior case in this Court that offers a greater threat to freedom of speech and press than this one does."⁶⁴ His point was that the press, imperfect as it inevitably is, would be devastated if it were subject to damages for non-defamatory mistakes.

Two members of the Court changed their votes, and in January 1967, a 5-4 majority set aside Mr. Hill's judgment.⁶⁵ Justice William J. Brennan, Jr. wrote the opinion of the Court.⁶⁶ He had written the landmark libel opinion three years earlier in *New York Times Co. v. Sullivan*.⁶⁷ That decision held that, because "the central meaning of the First Amendment" was the right to criticize government and its officials, someone who published such criticism could not be made to pay damages for mistakes unless such mistakes were knowing or reckless falsifications.⁶⁸ Now, Justice Brennan applied the same formula to the *Hill* case.⁶⁹ *Life's* falsifying of the Hill family's story had not been proved to be knowing or reckless, so it was entitled to a new trial at which that question could be decided by a jury.⁷⁰ "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs,"⁷¹ Justice Brennan wrote, "essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized commu-

61. SCHWARTZ, *supra* note 50, at 301.

62. *Time, Inc. v. Hill*, 385 U.S. 374, 397-401 (1966).

63. SCHWARTZ, *supra* note 50, at 299.

64. *Id.* at 301.

65. *Time*, 385 U.S. at 397-401.

66. *Id.* at 376.

67. 376 U.S. 254 (1964).

68. *Id.* at 273.

69. *See generally Time*, 385 U.S. 374 (1967).

70. *Id.*

71. *Id.* at 388.

nity. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press.”⁷²

Milan Kundera, with his powerful feelings about the need for privacy, would surely shudder at Justice Brennan’s statement that “[e]xposure of the self to others . . . is a concomitant of life in a civilized community.”⁷³ The Kundera and Brennan views define the ultimate issue on this subject, the conflicting claims of privacy and free expression. Each effectively dismisses the prime value of the other.

Justice Fortas, joined by two other members of the Court, dissented.⁷⁴ His opinion lacked most of the bitter rhetoric that was in his earlier draft of a majority opinion. But he did say that a state should have “the right to provide a remedy for reckless falsity in writing and publishing an article which irresponsibly and injuriously invades the privacy of a quiet family for no purpose except dramatic interest and commercial appeal.”⁷⁵ Reading the record differently from the majority, he said the jury had found *Life* reckless.⁷⁶

The fourth dissenter, Justice John Marshall Harlan, took a position that I find convincing.⁷⁷ Because this case did not involve an official or famous person, he said, the “marketplace” of free speech in which contesting ideas are supposed to wrestle in First Amendment theory would not work.⁷⁸ Mr. Hill could not command an audience to answer *Life*’s distortions.⁷⁹ So, there was a danger, Justice Harlan said, of “unchallengeable untruth.”⁸⁰ Accordingly, he would have required Mr. Hill to prove only that *Life*’s editors had been negligent in making their mistakes, rather than what is harder to prove, that they were deliberate or reckless in their falsification.⁸¹

One thing more must be said about the troubling case of *Time, Inc.*⁸² When details of the shifting votes inside the Court were made public in Bernard Schwartz’s *The Unpublished Opinions of the Warren Court*,⁸³ in 1986, former President Nixon, who had argued the case twice for Mr. Hill,

72. *Id.*

73. *Id.*

74. *Id.* at 411 (Fortas, C.J., & Clark, J., dissenting).

75. *Time*, 385 U.S. at 415 (Fortas, C.J., & Clark, J., dissenting).

76. *Id.* (Fortas, C.J., & Clark, J., dissenting).

77. *Id.* at 402 (Harlan, J., dissenting).

78. *Id.* (Harlan, J., dissenting).

79. *Id.* (Harlan, J., dissenting).

80. *Time*, 385 U.S. at 408 (Harlan, J., dissenting).

81. *Id.* (Harlan, J., dissenting).

82. 385 U.S. 374 (1967).

83. See generally SCHWARTZ, *supra* note 50.

asked his former counsel and law partner, Leo Garment, to look into it.⁸⁴ Mr. Garment wrote an article for *The New Yorker*.⁸⁵ He noted a statement by Justice Harlan that publicity carried a “severe risk of irremediable harm . . . [to] individuals involuntarily exposed to it and powerless to protect themselves against it.”⁸⁶ Mr. Garment said there had been testimony at the trial that the *Life* article had caused “lasting emotional injury” to Mrs. Hill. Then he wrote:

Two eminent psychiatrists had explained the causal dynamics of the trauma inflicted on her. Both said she had come through the original hostage incident well but had fallen apart when the *Life* article brought back her memories transformed into her worst nightmares and presented them to the world as reality. Both said she was and would for an indefinite time remain a psychological tin-diebox. In August, 1971, Mrs. Hill took her life.⁸⁷

Justice Brennan was a great figure on the Supreme Court: *Sullivan*⁸⁸ in particular was a transforming victory for freedom of expression. But I think the principle was pressed too far in *Time, Inc. v. Hill*.⁸⁹ James Hill was not a public person of the kind for whom the *Sullivan*⁹⁰ rule was imposed, someone who should have stayed out of the kitchen if he could not stand the heat. Nor was Mrs. Hill. I do not think the Hills of this world should have to jump such high hurdles in order to make a modest legal point about their privacy.

Then think of the *Hill*⁹¹ case in terms not of law, but of journalistic ethics. Justice Fortas’s original criticism of *Life*—“needless, heedless, wanton”⁹²—was hyperbolic. But did he not have a point in suggesting that responsible journalists have a duty of reasonable care, especially toward powerless private individuals like the Hill family? Neither William Sidis nor James Hill had sought public position or prominence; fame was thrust upon them. But what of those who put themselves in the public eye, the politicians

84. Garment, *supra* note 50, at 90.

85. Garment, *supra* note 50.

86. *Id.* at 109.

87. *Id.*

88. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

89. 385 U.S. 374 (1967).

90. *Sullivan*, 376 U.S. at 254.

91. 385 U.S. 374 (1967).

92. SCHWARTZ, *supra* note 50, at 251.

and celebrities who dominate today's publications and broadcasts? Do they have any right to privacy at all?

Press attitudes on that question have changed drastically. When Franklin D. Roosevelt was president, reporters and photographers effectively hid from the public the fact that he spent most of his time in a wheelchair.⁹³ When a photographer new to the White House took a picture of the president in his wheelchair, colleagues removed the film from his camera. Judge Charles Clark, in the opinion rejecting Sidis's lawsuit, said that he could imagine situations in which "public characters," as he called them, could protect their privacy by law.⁹⁴ "Revelations," he said, "may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency."⁹⁵

Nowadays it is hard to imagine any revelation so intimate that it would offend the public's sense of decency, or that the press would consider too invasive to publish. Anything that shows a politician in a bad light, especially a president, is fair game. And, of course, sex is best of all. We can date the end of press inhibitions to the moment a reporter asked Senator Gary Hart at a press conference, "Senator, have you ever committed adultery?"⁹⁶

We are obsessed with the sex lives of politicians. When editors are criticized for focusing on that subject, they often justify their choice by arguing that sexual behavior bears on a politician's fitness for office. Yet, I have never seen any evidence that sexual purity assures wise leadership. When a Linda Tripp comes along with her tales and her tapes, I think a mainstream newspaper editor or broadcaster should tell her to peddle them to a supermarket tabloid. That is what a French editor would surely do, but the French equivalent of a supermarket tabloid would not be interested either. Sex? What else is new? Only in the United States and Britain does the press go mad over straying politicians. Why? Is it something about the Anglo-Saxons, as the French call us? Or, is it a result of increasing competition for readers and viewers? If we do not publish it, that is, some bottom-dwelling slug will put it on his website. So in this view the news business is experiencing something like Gresham's law, with the vulgar and sleazy tending to drive out serious news. After September 11, 2001, newspapers and broadcasters did turn more serious. But after a time, analysts have

93. *FDR and Polio—A 'Splendid Deception'*, at <http://www.feri.org/archives/polio/deception.cfm>.

94. *See generally* Sidis v. F-R Publ'g Corp., 113 F.2d 806 (2d Cir. 1940).

95. *Id.* at 809.

96. *See* N.Y. TIMES, May 7, 1987, at A1.

found, many reverted to a search for the tawdry. Celebrity gossip is the staple of much of the magazine and tabloid newspaper world. The vicious gossip-monger who was the fictional antihero of *Sweet Smell of Success*⁹⁷ is not fictional any longer. But you do not have to be a celebrity to be a victim of today's intrusive journalism.

Ruth Shulman was driving on a California highway when her car was hit by another and rolled down an embankment.⁹⁸ She was gravely hurt, ending up as a paraplegic.⁹⁹ A rescue helicopter came to the scene of the accident and flew Ms. Shulman to a hospital.¹⁰⁰ What she did not know was that the nurse in the helicopter had a wireless microphone, and someone else had a video camera, filming her in agony.¹⁰¹ It all became part of a program that was really not news but a debased form of entertainment.¹⁰² Ms. Shulman sued for invasion of her privacy.¹⁰³ The Supreme Court of California ruled that she could have no legal objection to filming at the scene of the accident, but she was entitled to an expectation of privacy in the helicopter and could recover damages for the intrusion by the broadcast company into that privacy.¹⁰⁴

Or, think about Charles and Geraldine Wilson of Rockville, Maryland. Early one morning, while they were still in bed, their nine-year-old granddaughter was up and waiting for a school bus. They heard her open the door to someone.¹⁰⁵ Mr. Wilson, wearing only briefs, went out to see who it was.¹⁰⁶ Three policemen with guns drawn ordered him to the floor.¹⁰⁷ A photographer who was also there took a picture of him with an officer's knee on his back and a gun at his head.¹⁰⁸ The photographer worked for *The Washington Post*, as did the reporter who was there with him.¹⁰⁹ They were on what is called a "ride-along," accompanying the police in "Operation Gunsmoke," a search for wanted felons.¹¹⁰ The Wilsons' adult son was

97. Ernest Lehman & Clifford Odets, *Sweet Smell of Success* (1957 screenplay).

98. *Shulman v. Group W. Prod., Inc.*, 955 P.2d 469, 475 (Cal. 1998).

99. *Id.* at 476.

100. *Id.* at 475.

101. *Id.*

102. *Id.*

103. *Shulman*, 955 P.2d at 476.

104. *Id.* at 477.

105. *Wilson v. Layne*, 526 U.S. 603, 607 (1999).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* 526 U.S. at 607.

110. *Wilson*, 526 U.S. at 606-07.

wanted on charges of violating probation and was a target of Operation Gunsmoke.¹¹¹ He was not there, and in due course the police left.¹¹² The Wilsons sued the officers for violation of their Fourth Amendment protection against unreasonable searches and the case went to the United States Supreme Court.¹¹³

Some leading press organizations, including *The New York Times*, filed a brief defending such press ride-alongs as legitimate under the Fourth Amendment.¹¹⁴ "The news media afford the public," the brief said, "a unique window through which to observe the conduct of those officials . . . and the social conditions they confront."¹¹⁵ Does that persuade you? Not me. I do not think we need to find out about social conditions by having reporters and photographers burst into private homes with armed policemen. And it did not persuade the Supreme Court. It held that bringing the press into the Wilsons' home violated the Fourth Amendment.¹¹⁶

I spent fifty years as a newspaper reporter and columnist, and I believe with all my heart in the First Amendment. If the press is to do its job, it must look into some closed areas of government and society. It could hardly be effective in holding power accountable if it had to ask the permission of those who have power before looking into their activities. But, it is not inconsistent with the great function of the press in keeping power accountable to have some concern for the feelings of those who have not sought power, for William Sidis or Ruth Shulman, for example. Or, for Oliver W. Sipple, who had fame thrust upon him in an extraordinary way. On September 22, 1975, President Gerald R. Ford was visiting San Francisco.¹¹⁷ As he walked out of the St. Francis Hotel, a woman in the crowd, Sara Jane Moore, raised a gun and aimed it at the President.¹¹⁸ As she fired, Oliver Sipple, a former Marine, struck her arm.¹¹⁹ The shot missed Ford; Sipple may have saved his life.¹²⁰

Two days later Herb Caen, a columnist in *The San Francisco Chronicle*, carried an item suggesting that Sipple was gay and was a hero

111. *Id.* at 606.

112. *Id.* at 607.

113. *Id.* at 608.

114. Brief of Amici Curiae of ABC, Inc. et al. at *1, *Wilson v. Layne*, 526 U.S. 603 (1999) (Nos. 97-1927, 98-83).

115. Brief of Amici Curiae of ABC, Inc. et al. at *2, *Wilson* (Nos. 97-1927, 98-83).

116. *Wilson v. Layne*, 526 U.S. 603, 614.

117. *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 666 (Ct. App. 1984).

118. *Id.*

119. *Id.*

120. *Id.*

especially in the gay community of San Francisco.¹²¹ Other newspapers copied the story, and across the country Sipple was identified as gay.¹²² He sued for invasion of privacy, arguing that he was indeed homosexual but that he was entitled to damages for publication of private facts that would embarrass him.¹²³ The California courts ruled against him, finding that his sexual orientation was known to many before the Caen column so it was not legally “private.”¹²⁴

Decades ago the California courts held that publication of embarrassing facts that had been known to the public years before could be penalized by damages.¹²⁵ The case involved a former prostitute who had been accused of murder but acquitted.¹²⁶ In the following years, she had reformed, married and become a respected member of the town where she lived.¹²⁷ Then a movie was made about her life, *The Red Kimono*.¹²⁸ This had an adverse effect on her social position, and she sued for violation of her privacy. An appellate court said she was entitled to sue, but recent privacy decisions by the Supreme Court of California indicated that that precedent might no longer be followed.¹²⁹ Thus, the outcome of Oliver Sipple’s lawsuit seemed inevitable. The American legal culture, as it is today, would not accept a prohibition on publication of facts already widely known.

Other societies take a different view. Britain, which has never had a privacy tort, is developing one now after incorporation into domestic law of the European Covenant on Human Rights, which protects the right to respect for private and family life.¹³⁰ Early cases suggest that British courts may embrace the French concept of the “right to rehabilitation”—the right for past sins to be forgotten and an acknowledgment that information may be legally “private” even though it is known to friends of the offended plaintiff.¹³¹

The first important British decision expounding what we would call the law of privacy was handed down in March 2002 by the Court of Appeal.

121. *Id.*

122. *Sipple*, 201 Cal. Rptr. at 666.

123. *Id.* at 667.

124. *Id.* at 668.

125. *Melvin v. Reid*, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931).

126. *Id.* at 91.

127. *Id.*

128. *Id.*

129. *See e.g.*, *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998).

130. International Covenant on Civil and Political Rights, Dec. 16, 1966, Part III, Art. 17, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

131. *See A v. B Plc*, 2 All E.R. 545 (C.A. 2002) available at 2002 WL 230787.

The case was *A v. B Plc.*¹³² Lord Chief Justice Woolf delivered the judgment for a three-judge panel.¹³³ “A” was a leading British football/soccer player who had had extramarital sexual relations with two women, “C” and “D.”¹³⁴ “C” told her story to a tabloid Sunday newspaper, “B.”¹³⁵ “A” obtained an injunction from a high court judge forbidding the newspaper and the women to publish his, or anyone’s, name.¹³⁶ Lord Woolf set aside that restraint, giving what was an extraordinary victory to the interest of freedom of expression—extraordinary because British judges in the past have issued injunctions freely in disregard of that interest.¹³⁷ Judge Woolf wrote:

Even trivial facts relating to a public figure can be of great interest to readers Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure The public have an understandable and so a legitimate interest in being told the information The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.¹³⁸

Lord Woolf made two other points that advanced the interest of free expression in privacy matters. First, he said, “[r]elationships of the sort which A had with C and D are not the categories of relationships which the court should be astute to protect when other parties to the relationships do not want them to remain confidential.”¹³⁹ In other words, a public figure—even one as fleeting as a football player—must bear the risk that the other party to a sexual relationship may kiss and tell.¹⁴⁰ Second, Woolf said that courts “should not act as censors or arbiters of taste.”¹⁴¹ It must leave that to the ethics of journalism, policed in Britain to a certain extent by a body called the “Press Complaints Commission.”¹⁴² “[T]he fact that a more lurid

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *A v. B Plc*, 2 All E.R. 545, available at 2002 WL 237087.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *A v. B Plc*, 2 All E.R. 545 (C.A. 2002) available at 2002 WL 237087.

142. *Id.*

approach will be adopted by the publication than the court would regard as acceptable is not relevant.”¹⁴³

British tabloids are notoriously tasteless. But judges must not be swayed by that, Lord Woolf was saying.¹⁴⁴ Unless a judge weighing the interest in privacy finds it distinctly more compelling than that of publication, the nature of the publication does not matter. With that, the British press took a significant step toward the freedom its American colleagues have enjoyed.

The American press has largely been triumphant in its resistance to the law of privacy. It challenges the very constitutional premise of the true Brandeisian legal action for deprivation of privacy: the idea that publication of private facts, however embarrassing or even antisocial the publication may be, can be penalized. The press argues that, under the First Amendment, truth can never be penalized. The United States Supreme Court has carefully avoided deciding that question, avoiding it, for example, when a television station used the name of a victim of rape and murder when a state law prohibited disclosure.¹⁴⁵ The Court held that the station could not be penalized because a court official had inadvertently given it the victim's name.¹⁴⁶

But the press should not be too comfortable—too arrogant, I might better say—in its court victories against privacy claims. The public, coarse as its tastes have become, may react against disclosure for disclosure's sake if pressed too far against the powerless. There may still be, that is, what Judge Clark in the *Sidis* case called “the community's notions of decency.”¹⁴⁷ And, too, the public may react against developments in technology that strip us, unaware, of privacy, like a Microsoft Media Player that keeps a log stored on the user's own computer of all the movies he plays.

Government in this country has accumulated powers more intrusive than Justice Brandeis could have imagined. We need a press to watch it: “[a] cantankerous press, an obstinate press, a ubiquitous press,” as Judge Murray Gurfein put it in the Pentagon Papers case.¹⁴⁸ But “the right to know,” that phrase chanted by some editors as if it were a magic incantation, is not the only value in a democratic society, not even one as committed to the freedom of expression as ours. Privacy is also a crucial value, for

143. *Id.*

144. *See id.*

145. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

146. *Id.* at 496–97.

147. *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940).

148. *United States v. New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971).

reasons powerfully expressed a few years ago by Professor Thomas Nagel of New York University:

The distinction between what an individual exposes to public view and what he conceals or exposes only to intimates is essential to permit creatures as complex as ourselves to interact without constant social breakdown. Each of our inner lives is such a jungle of thoughts, feelings, fantasies and impulses that civilization would be impossible if we expressed them all Sex is an important part of what must be managed in this way, if a civilized human being is to be constructed on the ever-present animal foundation, but aggression, fear, envy, self-absorption and vanity all form part of the task. . . . Just as social life would be impossible if we expressed all our lustful, aggressive, greedy, anxious or self-obsessed feelings in ordinary public encounters, so would inner life be impossible if we tried to become wholly persons whose thoughts, feelings, and private behavior could be safely exposed to public view.¹⁴⁹

We are in the age of exposure now—self-exposure on Oprah Winfrey and the like, exposure of others by the press. Secrecy is a red flag to journalists, rightly so. Governments use it to hide corruption and incompetence, and to increase their unaccountable power. But in another sense—the sense articulated by Thomas Nagel and Milan Kundera—secrecy is an essential component of a civilized life.

149. Thomas Nagel, *The Shredding of Public Privacy: Reflections on Recent Events in Washington*, Times Literary Supp., Aug. 14, 1998, available at <http://www.geocities.com/CapitolHill/Senate/9634/tlsnagel.html> (last visited Nov. 3, 2002).

Irving v. Penguin UK and Deborah Lipstadt: Building a Defense Strategy, an Essay by Deborah Lipstadt^{*}

In September 1996, I received a letter from the British publisher of my book, *Denying the Holocaust: The Growing Assault on Truth and Memory*,¹ informing me that David Irving had filed a Statement of Case with the Royal High Court in London indicating his intention to sue me for libel for calling him a Holocaust denier in my book.² When I first learned of his plans to do this, I was surprised. Irving had called the Holocaust a “legend.” In 1988, the Canadian government had charged a German emigre, Ernst Zündel, with promoting Holocaust denial.³ Irving, who had testified on behalf of the defense at this trial, told the court that there was no “overall Reich policy to kill the Jews,” that “no documents whatsoever show that a Holocaust had

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She recently decisively won a libel trial in London against David Irving, who sued her for calling him a Holocaust denier and right wing extremist in her book. The trial was described by the *Daily Telegraph* (London) as having “done for the new century what the Nuremberg tribunals or the Eichmann trial did for earlier generations.” *The Times* (London) described it as “history has had its day in court and scored a crushing victory.” The judge found David Irving to be a Holocaust denier, a falsifier of history, a racist, an antisemite, and a liar. Her legal battle with Irving lasted approximately five years. According to the *New York Times*, the trial “put an end to the pretense that Mr. Irving is anything but a self-promoting apologist for Hitler.” In July 2001, the Court of Appeal resoundingly rejected Irving’s attempt to appeal the judgement against him.

Dr. Lipstadt has also written *BEYOND BELIEF: THE AMERICAN PRESS AND THE COMING OF THE HOLOCAUST* (Free Press/Macmillan, 1986, 1993). The book, an examination of how the American press covered the news of the persecution of European Jewry between the years 1933 and 1945, addresses the question “what did the American public know and when did they know it?”

1. DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993).

2. For additional information regarding this trial, see *Holocaust Denial on Trial*, at <http://www.holocaustdenialontrial.org> (last visited Jan. 25, 2003). The information contained in this essay is based on the personal experiences of the author. As a result, the reader should contact the author for further information regarding the contents of this essay.

3. *R v. Zündel*, [1992] 2 S.C.R. 731. He was charged under a law that was subsequently declared unconstitutional by the Canadian Supreme Court. *Id.*

ever happened,” and gas chambers were an impossibility.⁴ Since then, he repeatedly denied the Holocaust. When asked by the press why all mention of the Holocaust had completely disappeared from a new edition of one of his books, he responded: “If something didn’t happen, then you don’t even dignify it with a footnote.”⁵

I was sure that his threats to sue me were much “sound and fury” signifying very little at all. In fact, they would turn out to be anything but innocuous. They evolved into a six-year battle that would tremendously impact my life. In my book, which was a scholarly study of the phenomenon of Holocaust denial, I had devoted no more than a few pages to Irving.⁶ I had described him as a Hitler partisan, someone who knew the truth but who bent it until it fit his political ideology, and “the most dangerous Holocaust denier.” The reason, I argued, that he posed a danger was because he had written numerous books about World War II and the Third Reich, many of which were well-known and well regarded. Other deniers are publicly known only for being deniers. Irving, on the other hand, had a reputation as a writer of historical works that long predated, and was independent of, his activities as a denier. Consequently, his pronouncements about Holocaust denial garnered far more attention than they would coming from other deniers. More importantly, he could and did insinuate different elements of the panoply of Holocaust denial arguments in his books on other topics, for example, his biography of Goebbels. Even those readers who completely dismissed his beliefs about the Holocaust found it hard to avoid them. Though my words about Irving and his *modus operandi* were harsh, I did not worry about being sued because it seemed to me that what I had written was no worse than what others had written about him in the past. Moreover, everything I learned about Irving since the book was published in 1993 convinced me that my assessment of him was correct. It seemed utterly incomprehensible that David Irving would deign to challenge the charge that he was a Holocaust denier. My nonchalance about Irving’s charges of libel was reinforced by the fact that what I had written about him came from published sources. I assumed that this problem would be easily resolved.

My nonchalance when I first received Penguin’s letter was not the first time I had treated the topic of Holocaust denial with undue jocularity. I had done the same thing close to twenty years earlier when I first heard about Holocaust deniers. A professor from Israel was visiting Seattle where I then

4. David Irving’s 1988 Testimony, R v. Zündel, [1992] 2 S.C.R. 731.

5. Tr. of Day 1 at 97, Irving v. Penguin Books, Ltd. (Queen’s Bench Div. 2000) at <http://www.holocaustdenialtrial.org> (last visited Jan. 25, 2003).

6. See generally LIPSTADT, *supra* note 1.

taught. He told me about this loosely organized group which was actively sending out letters to university professors promoting a journal which denied the Holocaust. I had then wondered who would take them seriously. And now I wondered who could take David Irving's claims that he was not a denier seriously. Certainly this was a ploy just to scare me. As it turned out, I was wrong on all accounts. Irving would energetically fight. The fact that my sources were all documented did not protect me in the United Kingdom, as it would have in the United States. The British courts took this matter most seriously. In fact, since British libel law favored the plaintiff, it put the onus on me, the defendant, to prove the truth of what I had written, rather than on Irving to prove the falsehood, as would have been the case in the United States. Defamatory words are presumed under English law to be untrue. In short, I had to prove I told the truth. Had I not fought, he would have won by default. I would have been found guilty of libel and, ipso facto, Irving's definition of the Holocaust—no gas chambers in which Jews were systematically killed, no officially sanctioned Third Reich plan to kill the Jews, no systematic killings, no Hitlerian involvement in, or endorsement of, the persecution of the Jews—would have been determined to be a legitimate one.

This legal action was the first trial involving the Holocaust in which a denier was the plaintiff and a scholar the defendant. It was about me and what I had written, and it was about far more than me and my book. Ostensibly, it was about the past, but it was also how the past would be remembered in the future. The trial captivated the interest of both those who study the history of the Third Reich and the Holocaust, as well as those who study and combat neo-Nazi's attempts to resurrect that past. Two courts ultimately rendered a decision, the Royal High Court of Justice and the court of public opinion.

Although Penguin and I were both being sued by David Irving, we had different commitments and priorities. Penguin was a subsidiary of the multinational corporation, Pearson, Ltd., I feared that its fidelity would be to its parent company, its shareholders, and the financial "bottom line." Even if it wanted to fight, Penguin was not a completely free agent. An insurance company paid its legal expenses, and the insurance company would have a determining role in how the case would be handled. I feared that, as legal costs escalated, Penguin might abandon the case or be forced to do so by their insurers. Such a decision could come at any point, including after a trial had already begun. I could easily be left in the lurch midway through the proceedings. Penguin did have a commercial incentive to stay in the battle. Settling with Irving, though possibly financially attractive to a public

company, would give the publisher a black eye among authors. It might well make those who wrote controversial books leery about doing business with Penguin. Nonetheless, I could not be sure of what it would ultimately do. I was well aware that in recent years publishers had not made a practice of standing by their authors, even when they thought they were in the right. Given all this, I instinctively felt that I needed someone to formulate a legal strategy based on my best interests and no one else's.

At a loss as to how to proceed, I called a friend in London who had already heard about the case and had a suggestion for me: Anthony Julius. I knew Julius's name because he had just written *T.S. Eliot, Anti-Semitism and Literary Form*.⁷ Many reviewers had given critical acclaim to the book. Reviews had made a point of mentioning that Julius had written this intellectually thick book as his Ph.D. dissertation while working full time as a lawyer. I recalled a profile of Julius in *The New Yorker* in which he had observed, in response to a reporter's comment about a lawyer getting his Ph.D. in literary theory, that many lawyers have hobbies. This book was his "golf equivalent."

Julius had been intrigued by the way a great poet, such as Eliot, appropriated the degraded discourse of anti-Semitism to animate his own work. Eliot had taken that which the enlightened world had supposedly discarded, anti-Semitic speech, and turned it into art. But it was not just Eliot's anti-Semitism that intrigued Julius. It was the way legions of critics and readers had ignored, minimized, or tried to explain away this element of Eliot's work. Anti-Semitism was not, Julius argued, peripheral to Eliot's poetry, but central to those texts in which it appears.

Julius's book had generated serious discussion and debate regarding the literary establishment's treatment of Eliot's anti-Semitism. Eliot scholars had positioned themselves on different sides of the controversy that swirled around the book. Many scholars and critics had long dismissed Eliot's anti-Semitism as ironic, peripheral, or merely the "price to pay for admission into the club of Modernism." Some, perhaps feeling a bit defensive, rejected Julius's attempt to affix the label of anti-Semite on the work of a poet whom they so treasured. Others were tremendously impressed by Julius's erudite, even forensic, analysis of this aspect of Eliot's poetry and his argument that Eliot meant what he said about Jews. Julius's book was so tightly argued that one reporter described it as "the eviction of Eliot from the house of lame excuses." Attesting to the importance of this work, Oxford University's Professor of Poetry, James Fenton, had made it the subject of one of the

7. ANTHONY JULIUS, *T.S. ELIOT, ANTI-SEMITISM AND LITERARY FORM* (1996).

three annual lectures he delivers each year at the university. In the lecture, which was entitled “Eliot v. Julius,” Fenton posited that “whatever assessment is made of Eliot in the future, the Julius book will have to come into it.” Zeroing in on what may have well made some Eliot defenders so uncomfortable, Fenton noted, “Julius says an anti-Semite is a scoundrel. What is it that holds us back from saying that Eliot was a scoundrel?”⁸

Julius was also Princess Diana’s divorce lawyer and his name had regularly appeared in the British press during the Princess’s divorce settlement negotiations. He had become part of that story. Though I was happy to learn about Julius’s willingness to help me, I wondered if a divorce lawyer was the right person for a case such as this. A bit of Internet surfing revealed that his specialty was not divorce, but press and libel cases. Born in 1956, Julius studied English literature at Jesus College, Cambridge. He had joined a law firm in 1981, and became a partner by 1984. By 1986, he was a member of the firm’s management committee, and a year later, the head of its litigation department. He taught law part-time at University College in London where he created a new course, *Law and Literature*. Not surprisingly, a number of the reviewers linked his critique of Eliot to his work for Princess Diana. One described him as the ultimate iconoclast, willingly challenging two British idols, T. S. Eliot and the House of Windsor.

While Irving was hardly anyone’s idol, I figured that this was precisely the kind of lawyer I needed, one who was unafraid of taking on formidable cases. I reached for the phone to dial his office, fully expecting to have to negotiate my way through a phalanx of receptionists and secretaries. A friendly voice answered on the first ring, “Anthony Julius.” “Is this Anthony Julius’s office?” I asked. “This is Anthony Julius,” was the response. Surprised to be connected so rapidly, I launched into an explanation of the case. After a few moments he politely interrupted to assure me that he knew many of the details already. There was nothing left but the pivotal question. “Would you be willing to represent me?” Without any hesitation, Julius said, “Of course. I would be delighted to do so.” With someone of Julius’s caliber on board, I assumed that this matter would be dispatched in a relatively straightforward fashion.

I did not have long to bask in these feelings of reassurance. A few days later, a colleague dropped a recent issue of *The New York Review of Books* on my desk. “Hear you are having trouble with this guy, David Irving. There’s an article here which might interest you.” The journal contained a review of Irving’s recent biography of Josef Goebbels by the highly

8. *The Talk of the Town*, THE NEW YORKER, May 20, 1996, at 29.

venerated Gordon Craig, Professor Emeritus at Stanford University, and author of the *Germany, 1866–1945*,⁹ among many other important books. I respected Craig's work and was anxious to see his assessment of Irving. I was surprised, if not shocked, by what I read. While Craig disparaged Irving's claim that Auschwitz was "a labor camp with an unfortunately high death rate" as "obtuse and quickly discredited," he praised Irving's iconoclastic views of history.¹⁰ "Such people as David Irving have an indispensable part in the historical enterprise and we dare not disregard their views."¹¹ I wondered how Craig, an impeccable scholar with a distinguished reputation, could believe that someone with such a distorted notion of Auschwitz should have an "indispensable part" in the historical conversation. I found it perplexing that Craig could so readily bifurcate the different aspects of Irving's work. If Irving so grossly distorted one major element of the history of the period, how could his treatment of other elements be trusted? Second, I was deeply distressed by Craig's failure to grasp that, by including Irving in the conversation, he was according these "obtuse and quickly discredited" views a new found prominence and credibility. I worried, however, that if someone such as this highly respected scholar, who knew so much about the period, could be beguiled by Irving, how much easier it would be to beguile a jury of ten British citizens or even a British judge.

Though he hoped Irving would drop the threat of a lawsuit, Julius counseled that we must proceed as if we would end up in court. When I asked Julius how we were going to fight this, he explained that there were a number of different options open to libel defendants. They could argue that the plaintiff was misinterpreting the words in question. This option was not available to me because Irving was not misinterpreting what I had said about him. When I had called him a Hitler partisan, right wing ideologue, and Holocaust denier, I meant exactly that. The second option was to argue that the words were not defamatory. That, too, was not an avenue I could choose. The words were meant to be critical of him. I hoped that, when others read them, they would grasp that this man was a denier who had made overtly anti-Semitic statements. Finally, defendants could claim "justification," that the words, about which the complaint was lodged, though defamatory, were true and the author was, therefore, justified in writing

9. GORDON A. CRAIG, *GERMANY, 1866–1945* (1978) (OXFORD HISTORY OF MODERN EUROPE).

10. Gordon A. Craig, *The Devil in the Details*, N.Y. REV. OF BOOKS, Sept. 19, 1996 (reviewing DAVID IRVING, *GOEBBELS: MASTERMIND OF THE THIRD REICH* (1997)).

11. *Id.*

them. That, Julius explained, was the path we would pursue. While we did not have to prove that every detail of what I wrote was correct, we did have to prove the essence of my words, or, as the courts defined it, their “*substantial* truth.” In British law this is generally known as proving the truth of the “sting” of the libel.¹² We would not only demonstrate for the court the falsehood of Irving’s contentions regarding the Holocaust, but would also endeavor to show that, when discussing the Holocaust, Irving consistently distorted, misquoted, and ignored those documents which disproved his theories. Julius was unequivocal: “We will argue, exactly as you did in your book, that Irving does not follow established historical procedures and subordinates the truth for ideological purposes. His writings and comments about the Holocaust are, we will contend, designed to spread anti-Semitism and engender sympathy for the Third Reich.”

As Julius laid out our battle plan, I felt reassured. Julius, who told me he would be working together on this matter with his colleague, James Libson, explained that, at this point, he was not sure Irving would really pursue this case. Our objective, in fact, was to get him to drop the case. We would do so by vigorously responding to his charges, using every legal avenue open to us. We hoped that, faced by a formidable opposition, he would drop the matter. Listening to Julius talk about Irving, I understood that his Eliot book was far more than a “golf equivalent.” It was an expression of his deepest intellectual and moral commitments. He could not abide anti-Semitism irrespective of whether it came from a T.S. Eliot or a David Irving. He had even less tolerance for those who were willing to ignore, justify, or rationalize away hatred and prejudice for any reason, be they critics, reviewers, or scholars.

Over the next few months, Julius and James laid out for me in e-mails and phone conversations the various steps involved in this kind of libel case. James, whose job it seemed to be to walk me through the intricacies of British law, explained that first we would have to prepare the “pleadings,” our presentation to the court of what we perceive to be the central issues in the case. At the same time, we would begin the discovery process, the process by which each party turns over to the other side all materials it has in its possession relevant to the issues, including correspondence, documents, papers, books, and tapes. All the research material I used in preparing the book was going to have to be disclosed. So, too, I would have to disclose any correspondence or notes that concerned Irving.

12. *Judgment at 4.7*, Irving v. Penguin Books, Ltd. (Queen’s Bench Div. 2000), at <http://www.holocaustdenialontrial.org> (last visited Jan. 25, 2003).

The next step was the preparation of witness statements. My statement would be my means of introducing myself to the court. In it, I would have to provide background information on my professional and personal life, insofar as it pertained to the case. We would then select expert witnesses, and ask them to analyze Irving's work in order to assess my claim that he was a denier and falsifier of history. Their reports would be submitted to the court and to Irving well in advance of the trial, if there was to be one. English court proceedings stipulate that the parties to such suits prepare their evidence in writing and exchange it in the form of witness statements some time before the trial. The purpose is to avoid "trial by ambush" and also to shorten any legal proceedings. It was a crucial stage since one commits, fairly early on, to the evidence which will be introduced at the trial. Finally, based on the expert reports, we would present Irving with a list of interrogatories, questions which he would have to answer prior to the trial itself. Julius and James were fairly certain that Irving, faced for one of the first times in his career with a vigorous defense against his legal threats, would eventually abandon this case. Underlying this strategy was a fundamental proposition, which James articulated for me one day in a phone conversation when I expressed amazement at the level and amount of work being done:

No detail will be left unturned. We will never allow ourselves to assume, even for a moment, that simply by putting before the jury an array of Irving's statements we will succeed in convincing it of the truth of your words. We will fight this case as if it were the biggest commercial case to ever cross our desks. Though we may believe that Irving denied the Holocaust, we will not lull ourselves into thinking this will be self-evident to either a judge or a jury.

As our strategy evolved, we not only decided what we would do, we also decided what we would not do. Many people, lawyers in particular, urged us to consider a countersuit against Irving. Julius, James, and I agreed that, even if Irving decided to drop the case, we would not pursue that avenue. We knew that a countersuit would create a real burden for Irving. However, since he had few accessible financial assets, there seemed to be nothing to be gained from a countersuit. It would afford him the media attention he so craved, as well as the opportunity to play the victim. We also determined that if we did go to court, we would not call survivors. Our decision was based on both forensic and moral calculations. We were adamant that this trial was not about proving the Holocaust happened. It was about proving that as related to the history of the Holocaust, David Irving

was a liar. To have called survivors would have been to suggest that we needed the “eyewitnesses” or “witnesses of fact” to prove that there indeed was a Holocaust. There was another reason why we were reluctant to put survivors in the witness box. Irving was planning to act as his own lawyer. We did not believe it ethical to place elderly survivors in a position to be harassed and challenged by a Holocaust denier. Though we did not doubt that they could withstand his challenges to their testimony, we did not feel it right to impose this burden on them.

Over the course of the Fall of 1997, Julius, James, and I were in frequent conversation about what we would want our team of experts to do. Knowing Irving’s work as I did, I fully expected the experts would find a willful pattern of historical distortions when they scrutinized his writings on the Holocaust. The experts’ reports on Irving served another purpose as well. They would put Irving on the defensive and alter the equilibrium of the legal battle. He began this process as the plaintiff. As a result of our exposure to his historical calumnies he would end up, we hoped, as the “defendant.” By January 1998, an impressive team had been drafted. We asked Professor Richard Evans from Cambridge, a specialist on German history, to serve as our lead historical witness and conduct a historiographic investigation. He would analyze Irving as a historian, asking whether, when writing about the Holocaust, Irving adhered to generally acceptable standards of historical scholarship, or whether he deliberately distorted and falsified history. In essence, we asked him to follow Irving’s footnotes. I was familiar with Evans’ work on Germany, particularly his book *In Defense of History*,¹³ which challenged post-modernist critiques contending that history was often used as an ideological prop for bourgeois institutions. Evans’ book argued that the past “really happened, and we really can, if we are very scrupulous and careful and self-critical . . . reach some tenable conclusions about what it all meant.”¹⁴ It was this that had prompted Julius to suggest Evans serve as our lead historical witness. Professor Robert Jan van Pelt, an architectural expert who had coauthored a meticulous, in-depth study of the history of Auschwitz, joined Evans. Few people in the world were more familiar with Auschwitz, its history, and its archives than van Pelt. We asked him to focus on Irving’s claims that the gas chambers at Auschwitz were fakes. How did Irving justify these claims? What “evidence” did he use to buttress his conclusions? Did Irving take into consideration existing testimony and documentary evidence regarding the

13. RICHARD J. EVANS, *IN DEFENSE OF HISTORY* (1999).

14. *See generally id.*

gas chambers? Professor Christopher Browning of the University of North Carolina, author of *Ordinary Men: Reserve Police Battalion 101 & the Final Solution in Poland*,¹⁵ and an expert on the origins of the Final Solution, agreed to evaluate Irving's assertions that those Jews who were killed were victims of rogue actions and not of a centralized plan, a Final Solution with its roots in the highest echelons of the Third Reich. In his report, Browning would marshal the documentary evidence of the Final Solution, evidence Irving had to ignore in order to make his claims. Chris Browning was then in the process of serving as a witness for Scotland Yard at the war crime trial of Anthony Sawoniuk.¹⁶ Sawoniuk, who had been charged with murdering Jews, had arrived in England after the war and worked as a British Rail ticket collector. The prosecution charged that he had personally been responsible for murdering Jews in his hometown of Domachevo, Belarus. Browning testified as an expert witness at the Zündel trial when Irving had proclaimed Holocaust a legend and the gas chambers fakes. Peter Longerich, a German born specialist on Hitler and a Professor at the University of London, would analyze Hitler's role in the Final Solution. Longerich would focus on Irving's claim that Hitler had no direct role in the persecution of the Jews. Hajo Funke, a Professor of Political Science at the Free University in Berlin and one of Germany's leading specialists on right wing extremism, agreed to examine Irving's involvement with the German radical right and neo-Nazi fringe. We wanted to demonstrate to the judge and jury that David Irving's Holocaust denial had a motive and that there was a relationship between his pattern of historical falsification and political ideology. In other words, his Holocaust denial was not just loopy history but was a means of furthering his political ideology.

As the months passed, I became consumed by the preparation of my discovery list. I began to have almost daily phone calls with James and his colleagues, reviewing what would be on my list. They kept stressing that I had to scour my files and pull everything that might, even in the most oblique way, relate to what I had written about David Irving. I also had to strip my shelves bare of any books I had cited in *Denying the Holocaust*.¹⁷ All those books had to be sent to London. Together with my research assistant, we began to review the thousands of pieces of paper I had accumulated while writing the book. Files that I had assumed I would never seriously look at again were piled high on my desk. Books, some with the

15. CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 & THE FINAL SOLUTION IN POLAND* (1992).

16. *R. v. Sawoniuk*, 2 Crim. App. R. 220 (C.A. 2000).

17. LIPSTADT, *supra* note 1.

yellow post-it notes I had used while writing the book still on them, were packed up to be sent off to England. It was a tedious job and I deeply resented having to do it. As I reached the end of the process, Julius and James, anxious that there be no question about my having fully complied with the rules of the discovery process, arranged for an American lawyer who specialized in libel, to come to my home to review the process by which I had prepared the discovery list. I expected his visit to be a perfunctory one. When he left five hours later, I was completely exhausted. He had opened files at will to see if there was anything there that could even remotely be connected with the case that I had not sent to London.

One afternoon during a visit to London, Evans and I met in my hotel and walked over to the University of London in order to hear the historian John Lukacs speak about his new book, *The Hitler of History*.¹⁸ I looked forward to the lecture for two reasons. I wanted to get to know Evans a bit and thought this might allow me that opportunity. I was also anxious to hear Lukacs because his book severely castigated Irving for the way he mangled history, particularly in relation to Hitler. After the Gordon Craig review, it was refreshing to read Lukacs' unequivocal description of Irving as an "unrepentant admirer of Hitler,"¹⁹ who engaged in frequent "twisting"²⁰ of documentary sources. Irving was an "apologist"²¹ and "rehabilitator"²² of Hitler whose opinions had an "unsavory character."²³ Lukacs castigated those historians, critics, and reviewers who relied on Irving's researches and gave him "qualified praise."²⁴ Had they bothered to examine Irving's sources, they would have found that his work was filled with "unverifiable and unconvincing assertions."²⁵ The book, already out in the United States, had not yet appeared in a British edition. At the lecture, Lukacs told me that the British edition might be delayed. Irving was threatening to sue. Lukacs made it clear that his publisher, Macmillan, was watching my case closely. As we left the lecture, I told Evans that Irving's threats against Lukacs exemplified why it was so important to fight this battle: "Unless someone stands up to Irving and refuses to be cowed by his threats, he will keep doing

18. JOHN LUKACS, *THE HITLER OF HISTORY* 26, 132, 178, 229–30 (1997).

19. *See generally id.*

20. *See generally id.*

21. *See generally id.*

22. *See generally id.*

23. *See generally* LUKACS, *supra* note 18.

24. *See generally id.*

25. *See generally id.*

this to every author who exposes him for what he is. He'll shut down any book which is critical of him."

During another visit, Julius, Evans, Browning, and I had dinner together. Browning was then testifying in the war crimes trial of Anthony Sawoniuk. Browning, who had seen how Holocaust deniers operate in the courtroom during the Zündel trial, believed that Irving saw the trial as a "platform" to gain publicity and support from his followers. Browning understood our reluctance to call survivors as witnesses. "The Zündel trial was horrible for them. The survivors who testified were not the only ones who suffered. Even spectators sitting in the gallery found it painful to watch what was done to them on the stand." Evans shared his observations based on his months of looking at Irving's work. "Every time I look at Irving's historical work I find a complete falsification. All veneer of respectability slips away as soon as you begin to do the research." Looking at me, Evans said, "Based on our research thus far, I think that Deborah was much too kind to him. He seems to do everything she says he does."

As we talked about the historical evidence, I reflected on the clash of cultures that faced us. An argument that would be readily embraced in a scholarly setting might have to be set aside in the forensic setting. I spent most of my life in the academic world, knew that culture well, and was comfortable in it. I worried about the forensic world, but I knew our case would be strong. There were, however, so many variables and unknowns. One prejudiced or even iconoclastic judge or juror could bring us down. Arguments, which would have trumped all others in the scholarly world, had to be set aside because of the vagaries of a jury.

Throughout the summer, Mischo de Reya and Davenport Lyons, Penguin's solicitors, poured over Irving's discovery list, the list of those documents which, because they had some relationship to the case, he was required to share with us prior to the trial. It consisted of close to 1500 items. When I first saw it, I was overwhelmed both by its size and by the fact that, at first glance, it seemed to be filled with items that bore no connection with my case. Could this, I wondered, be a boilerplate list, one that he used for other legal actions? He was preparing to sue the journalist Gitta Sereny, who in 1996 had written a critical review of his book *Goebbels*²⁶ in *The Observer*.²⁷ The list contained items that related to her case and not to mine. James worked together with the other lawyers in a careful perusal of what was on his list. I was amazed at the work that went

26. DAVID IRVING, *GOEBBELS: MASTERMIND OF THE THIRD REICH* (1997).

27. See generally Gitta Sereny, *Spin Time for Hitler*, *THE OBSERVER*, Apr. 21, 1996 (reviewing DAVID IRVING, *GOEBBELS: MASTERMIND OF THE THIRD REICH* (1997)).

into the preparation of this application for the additional materials. The lawyers had made note of the many items that had nothing to do with our case. James explained why this was important. "In England, the loser pays the costs. When we win and it comes time to assess our costs we will bill him for the time spent separating the wheat from the chaff, that which pertains to our case and that which had no connection to our case."

James and the others did something else that was far more important. First, they looked for what was missing on the list. Even though we had, at first, been taken aback by the size of his list, we soon recognized that it was very incomplete. Responses to letters were there without the original letter. References were made to enclosures that had been sent to Irving, but the enclosures were missing. Then, in what was the most crucial step, they composed a twenty-page "wish list," consisting of items they believed were in Irving's files but were not included on his discovery list. This included his correspondence with leading Holocaust deniers, anti-Semites, and neo-Nazis. In addition to the items missing from his discovery list, we asked for access to his complete collection of video and audiotapes. We were anxious to show a jury that what he said in "public" in his books when he was playing the part of historian was dramatically different from what he said in "private" when he was talking to his most ardent followers, many of whom seemed to share his political ideology. We also asked for access to his personal daily diary. We argued that the diaries would help us prove that he indeed did keep company with neo-Nazis and radical right-wingers. Such evidence would buttress our argument that there was a relationship between his historical falsifications and his political ideology; there was a motive. We wanted these materials for building my defense, but asking for them might have an unintended consequence. We assumed that this would be the material Irving would be most ardent to keep out of the eyes of the public. If this material contained information on Irving's connections with extremists and neo-Nazis, he would want, we speculated, to keep it out of the public domain. He would then, we presumed, calculate that it was better to drop the case than to allow this material to see the light of day.

In September 1998, Julius, James, and the Davenport Lyons lawyers went into court to challenge his list as it now stood, and to present the application for the additional materials. I asked Julius if he wanted me to be present. Much to my surprise he told me no. "We want him to drop the case. Your presence at a hearing will appeal to his sense of theatricality. It might give him an inflated sense of importance and make him less inclined to drop the matter." Pre-trial hearings are presided over by a Master. James described him as "a sort of junior judge." Our Master was, much to my

amusement, named Master Trench. Given the nature of the battle that occurred at this hearing, it was probably an appropriate name. Irving assiduously fought to keep all these materials out of our hands. He was, he complained to the court, being forced to disclose his “stock and trade.” We were, he charged, on a “fishing expedition.” At first, Master Trench seemed sympathetic to Irving’s contentions and he questioned the broad sweep of our application. Julius explained that the all-inclusive character of our list was a response to the manner in which Irving had structured his charges. Irving’s accusations were exceptionally broad and we were, therefore, obligated to respond in kind. Irving made the sweeping argument that I had damaged, if not destroyed, his career and his reputation as an historian. We, thus, were obligated to prove the precise nature of that career. In order to do so, we had to examine far more than the historical materials he used in the preparation of his books.

Throughout this hearing, which stretched from one day into the next, whenever Master Trench agreed to one of our requests and Irving saw that he had lost, he would complain that this action was part of the global conspiracy against him. He accused “the enemies of truth,” Irving’s euphemism for the Jews, of being out to destroy him. James, who called me to give me a detailed description of the proceedings, described it as his “last line of defense.” It reminded James as sounding “like the desperate act of a desperate man.” James continued:

The problem for Irving is that he can make the conspiracy claim now. He won’t be able to make it when the expert reports come in. Historians such as Richard Evans, Chris Browning, Robert Jan van Pelt and the others can hardly be accused of being part of the conspiracy. He’s going to have to find a better challenge for them.

At the end of the hearing, Master Trench agreed to virtually all our requests including the right to inspect the diaries. It was such a sweeping victory that even Julius, who generally adopted a low-key attitude and took our successes in almost studied stride, allowed just a trace of excitement to creep into his voice when he called me. He described Master Trench’s order as an “outstanding” development. James, who called a few moments after Julius, made no effort to contain his excitement. “We had a fantastic day in court. Master Trench’s order is so wide we will not only get the items we ask for, we will probably obtain materials we did not think we would get. Irving is going to have to strip his files bare. A great burden has been placed on him.” Master Trench also took the unusual action of requiring Irving to sign an

affidavit that his discovery was complete and compelled him to pay for the costs of the work entailed in the discovery application. Thrilled by James's report, I asked, "So will this get him to drop the case?" My excitement about our success was tempered a bit by James's response. "When we began this challenge to his discovery list, I thought it would. Now I don't think so. A rational man might drop matters now. If he doesn't do so, then we will have to depend on the expert witness reports and the interrogatories to get him to drop out." We were about to end the conversation when James added:

Oh yes, I was so excited by our successes that I forgot to tell you. At the hearing, Anthony, who makes a point of avoiding getting into any conversation with Irving, suggested to him that since this case was so 'complex and intricate' it would be better if it was heard by just a judge and not a jury. Irving agreed and Master Trench will issue the order: No jury, just a judge.

I was pleased that the variable of an unknown group of people who would be obligated to read reams of material had been removed from this case.

The other reason I was pleased at this development was that a jury would only render a verdict. A judge would give a written judgment, laying out the reasons for his or her decision. It would provide a perfect opportunity for a ringing indictment of Irving and his historical lies. When I expressed my satisfaction about this to another British jurist I knew, he had a warning ready for me. "Deborah, don't be disappointed if the judgment is not the sweeping condemnation of Irving you want." He proceeded to explain that British judges are masters at practicing judicial restraint. "They might say," he explained, "'I did not find this witness helpful.' Everyone associated with the legal process will recognize that as a euphemism for 'This witness lied to me.' Those outside the legal process will not read it as that."

Master Trench had given us the right to the diaries but placed strict limits on our use of them. Because they contained highly personal information, only the lawyers and those experts who were working on the topic of Irving's connection with neo-Nazis could see them. If they found something that pertained to the work of another expert, they could pass that section on. No one else, myself included, could inspect the diaries. While this stipulation protected Irving from having people troll through his personal diaries, it did not offer him complete sanctuary. Any portion of the diary that we introduced into court became part of the public record. As the

experts began to review the material from Irving's personal files and diaries, I was surprised to learn of his interaction with key American personalities. During his visits to the United States, he had established contact with the former Ku Klux Klan leader, David Duke. Duke and Irving not only played tennis together but exchanged lists of their major donors, apparently assuming that donors who supported one of them would be inclined to support the other. Irving edited Duke's book, *My Awakening*.²⁸ The book was replete with so many racist and antisemitic diatribes that I found it difficult to read. I was sitting with Julius and James, reviewing the material from the diaries and the list of documents we had from Irving's files, when I came across the information about Irving's speaking engagements before the American extremist group, the National Alliance. The National Alliance advocated that the United States be divided into racial regions; whites would live in the choicest ones and people of color (that included Jews) in the others. Its founder was William Pierce, who was the author of *The Turner Diaries*,²⁹ which had become the "Bible" of far right wing extremists. He advocated that extremists fight the government of the United States by engaging in "leaderless revolution," i.e. that they operate as small cells that could not be traced back to any large overarching organization.³⁰ Irving's diaries and correspondence revealed that he was in regular contact with German neo-Nazis and extremists. During the two-year period immediately following the unification of Germany, he regularly traveled to the former East Germany where he had participated in a series of neo-Nazi rallies and given talks to groups the German government labeled as extremist.

Irving then went to court and demanded that I, too, have to sign an affidavit attesting to the honesty of my discovery procedure. Master Trench agreed. James believed that the only reason Master Trench did so was because Irving was representing himself. "He wants to give him as much leeway as possible. If Irving had counsel, you may not have had to complete such a form." James explained that, "it really was not a big deal." All I had to do was go to a British embassy or consulate and swear before an embassy official that I had turned over all pertinent documents to my adversary. I complied, but as I did so I thought of how my life had been disrupted by this case.

28. DAVID DUKE, *MY AWAKENING: A PATH TO RACIAL UNDERSTANDING* (1998).

29. ANDREW MACDONALD, *THE TURNER DIARIES* (1996). Andrew MacDonald is a pseudonym used by William Pierce. See *Q & A on The Turner Diaries*, at http://www.adl.org/presrele/Militi_71/2737_71.asp (last viewed Jan. 25, 2003).

30. *Id.*

Though I could not talk to the press about the discovery materials from Irving's files, there were still other things I could discuss with reporters, who were beginning to call for interviews. I was anxious to explain to them that Irving was not to be trusted as a historian and that this trial was not about competing versions of history. In early 1999, over lunch in a small Bloomsbury bistro near the Mishcon offices, I asked Anthony what topics I should avoid when talking to the press. He looked at me and, in his blunt fashion, said, "All of them. Just don't talk to the press. Period." When I asked why, Julius argued that David Irving craved publicity. If I refused to cooperate, most reporters would drop the story, thereby denying Irving the attention he so wanted. Furthermore, Julius continued, "British judges hate it when a case on which they are scheduled to sit is litigated in the press prior to coming to trial." I began to mull over his view. After lunch, as I made a quick detour to the British Museum, I realized that when a lawyer tells a client something it is not an "opinion" or a "suggestion." It is far more than that. I knew that I was used to talking to the press. I did it well. It seemed silly not to allow me to use my talents in this regard. I knew, however, that I also had to follow my lawyer's instructions in this regard. As an academic, I was not used to taking orders about what I could and could not say, particularly when it related to my professional work. Academia was, in fact, all about the freedom to think and write as one wished, within the confines of one's discipline. Thinking about this, I realized that one of the hardest aspects of this whole saga would be ceding control to someone else. This could well become the professional fight of my life, and because it was in an unfamiliar arena, I could not lead the charge.

Dick Schaap: Covering a Contest Called Life, an Essay by Jeremy Schaap*

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I. INTRODUCTION

In an interview conducted in the Summer of 2002, *Sports Illustrated's* Rick Reilly challenged Chicago Cubs' slugger Sammy Sosa to take a drug test for steroids.¹ Sosa, who had invited the challenge by saying he would be the first in line to be tested if the players' association agreed to testing, was furious—and profane.² He lashed out at Reilly, said he was tricked, and that Reilly had betrayed him.³ Did Reilly break a promise to Sosa? No one other than Sosa or Reilly knows. However, their confrontation was far from unusual in the increasingly hostile climate that defines athlete-media relations.

At the World Series in 1999, Pete Rose was honored as one of the “players of the century.” NBC's Jim Gray used the occasion to question

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1. Rick Reilly, *Excuse Me for Asking*, SPORTS ILLUSTRATED, July 8, 2002, at 94.
2. *Id.*
3. *Id.*

Rose about gambling on baseball.⁴ Gray wanted to know if Rose was ready to admit that he bet on the game that had been his life. Rose, who was banned from baseball for life in 1989 for gambling, tried to deflect the questions, but Gray was persistent. Rose told Gray, "I'm surprised you're bombarding me like this . . . on a great night, great occasion, great ovation."⁵

The public reaction to Gray's line of questioning was overwhelmingly negative.⁶ To quell the controversy, he was forced to make an on-air apology later in the World Series.⁷

In 1993, as the New York Mets, who were expected to challenge for the pennant, were suffering through a season in which they would eventually lose 103 of their 162 games—the worst record in the major leagues that year—outfielder Bobby Bonilla threatened reporter Bob Klapisch in the Mets' clubhouse.⁸ Bonilla told Klapisch, who had frequently criticized Bonilla in his stories, that he would, "show him the Bronx," then knocked away a microphone that had been recording the confrontation.⁹

Bonilla's colorful outburst illustrated the lack of respect between the media and the Mets. So did an incident of July 4, 1993, again in the Mets' clubhouse, when former Cy Young Award-winning pitcher Bret Saberhagen squirted bleach on several reporters and cameramen.¹⁰ It was not a playful prank.

Detroit Tigers' pitcher Jack Morris once famously dumped a bucket of cold water on the head of Detroit Free Press columnist Mitch Albom. Outfielder Deion Sanders once did the same to baseball announcer Tim McCarver, a former major league catcher. Outfielder Dave Kingman once

4. Richard Sandomir, *Gray Interrogates Rose at an Inappropriate Time*, N.Y. TIMES, Oct. 25, 1999, at D8.

5. *Id.*

6. *Id.*

7. Richard Sandomir, *Interviewer of Rose is Snubbed by Curtis*, N.Y. TIMES, Oct. 27, 1999, at D3 (stating the apology was made on October 26, 1999 during NBC's pre-game show).

8. George Vecsey, *Can Bonilla Get Along in New York?* N.Y. TIMES, Apr. 16, 1993, at B9 (noting Bob Klapisch, of *The New York Daily News*, was the co-author of a book titled *The Worst Team Money Could Buy*, which chronicled the struggling New York Mets franchise).

9. *Id.*

10. Malcolm Moran, *On Rainy Day, Saberhagen Pitches a Fit*, N.Y. TIMES, Aug. 7, 1993, at B31 (noting Saberhagen originally denied participating in the incident, but a team investigation proved otherwise and led to disciplinary action against the pitcher).

boxed up a dead rat and sent it to a reporter in the Oakland Coliseum press box.¹¹

These examples are culled from only baseball. However, in football, basketball, and to a lesser extent in hockey, there have been hundreds of similar confrontations. Essentially, today's athletes do not get along very well with the men and women who cover them. The relationship is, above all else, adversarial. This is not to say that every clubhouse and locker room is a minefield for reporters. Incidents like those mentioned above are still relatively rare. Most athletes tolerate the media. Most reporters are fair. However, the climate has undoubtedly changed.

II. THAT WAS THEN . . .

It was a very different world in 1956, when my father, the sports journalist Dick Schaap, graduated from Columbia University's School of Journalism. The Golden Age of Sports, the Roaring Twenties, were long over, but the romance had not died. The Brooklyn Dodgers were the world champions. The Dodgers' Duke Snider patrolled center field at Ebbets Field, while Mickey Mantle and Willie Mays were playing the same position for the Yankees and Giants, respectively, in the same city.

Rocky Marciano was the heavyweight champion of the world, Archie Moore was the light heavyweight champion, and Ray Robinson was the middleweight champion. Everyone knew who they were and what titles they held. The National Football League, at thirty, was still in its media infancy; two years later, the Giants-Colts overtime championship game at Yankee Stadium would lift the sport into maturity. Bill Russell was preparing to play for the United States Olympic team in Melbourne, and Wilt Chamberlain was still a student at the University of Kansas. In hockey, Maurice Richard of the Montreal Canadiens and Gordie Howe of the Detroit Red Wings were the dominant figures in their six-team league. Vince Lombardi was still an assistant coach on the staff of the New York Giants. Ben Hogan and Byron Nelson were fading, and Arnold Palmer was just beginning to assert himself on the PGA Tour. Sports were far from pure, but they were still covered as a diversion, not as big business.

It was this world that my father entered in 1956, straight out of journalism school, as a reporter at *Newsweek*. His colleagues included

11. See, e.g., *High 5: What are the Top 5 Baseball Announcer Controversies of All Time?* N.Y. DAILY NEWS, Sept. 22, 2002, at 3 (determining the McCarver and Sanders fights were number one on the list).

Roger Kahn, who would eventually write *The Boys of Summer*,¹² the definitive book on the Brooklyn Dodgers of the 1950s; and John Lardner, the gifted son of the gifted sports and short story writer, Ring Lardner.

Before my father had even joined *Newsweek*, Kahn took him to dinner with his hero, the Dodgers' Jackie Robinson. That was the culture then. Reporters, even the greenest among them, broke bread with the biggest stars in sports. There was, for the most part, mutual respect and an understanding on the part of the athletes that the writers had a job to do. In the 1920s, every writer who traveled with the New York Yankees knew that Babe Ruth was a gluttonous womanizer and whoremonger.¹³ No one wrote a word to that effect. Now, every indiscretion is considered fair game, and athletes do not like it at all.

My father's relationships with the athletes he covered were rarely acrimonious. Unlike so many of his colleagues, he fundamentally liked athletes, and, in turn, they liked him. In terms of developing trusting relationships, my father also had a distinct advantage over most of his colleagues. He never regularly covered sports for a newspaper. He never had a beat. If he had, he would have been compelled to be critical, and at times to be confrontational. That is the nature of beat writing and column writing. When a relief pitcher blows a lead, or a manager loses control of his team, it is the newspaper reporter's obligation to poke, prod and probe—to dissect failure.

My father was never obligated to deal with athletes when they were down. As a national reporter for magazines and television, he could focus on the subjects and the people he liked, and whose company he enjoyed. There were rare instances when he would have to deal with a difficult person, but for the most part, he could choose his topics and deal with those athletes who were his friends, or at least friendly.

As a general city-side columnist at the *New York Herald Tribune* and its successor, the *World Journal Tribune*, my father could not be so discerning. He dealt with all the criminals, scoundrels, and politicians who helped run New York in the mid-1960s, and he did not deal with them kindly.

In *The Paper*,¹⁴ the award-winning history of the *Herald Tribune*, Richard Kluger wrote:

12. ROGER KAHN, *THE BOYS OF SUMMER* (Perennial Classics 2000) (1971).

13. See, e.g., ROBERT W. CREAMER, *BABE, THE LEGEND COMES TO LIFE* 21 (Penguin Books 1983) (1974).

14. RICHARD KLUGER, *THE PAPER* (Vintage 1986).

In 1965, [Herald Tribune publisher Jock] Whitney ordered the editors to kill a column by Dick Schaap, who by then had forsaken the city-editorship to write heavily ironic commentary for the split page on the connivances and blunderings of the power elite. Schaap's offending column, noting how Governor [Nelson] Rockefeller's former allies had abandoned him wholesale in the wake of his matrimonial misadventures, was intended as a comment on the fickleness of politics, but Whitney, missing the point or not wanting to make it at the expense of his friend Nelson, said, "Why beat a dead horse?" But when Schaap later deftly needled Mayor John V. Lindsay, the great white hope of New York Republicans, whom the Tribune had given strong editorial backing—and Whitney and [Herald Tribune president Walter] Thayer had supported financially as well—in the mayoral campaign, he was never censored.¹⁵

One of my father's favorite subjects was Robert Moses, the czar of New York's parks and roadways. In *The Power Broker*,¹⁶ Robert Caro's Pulitzer Prize-winning biography of Moses, Caro wrote:

Dick Schaap wrote a whole—hilarious—column on the impossibility of reaching [Moses] on the phone, and when he visited [Generalissimo Francisco] Franco wrote: "Moses' mission to Madrid is another indication of his keen public relations sense. Franco is practically an American folk hero. His firm democratic stance cannot be questioned. No one could be more deserving of the World's Fair's Gold Medal, unless, of course, it is Robert Moses himself."¹⁷

My father's relative gentleness as a sports writer can be attributed in large part to his experiences in hard news. It was difficult for him to muster real indignation about sports after having covered the Watts riots and the civil rights movement—which is not to say that he wrote about sports as if they were somehow pure. However, for the most part, when he covered sports, he tended to make friends, not enemies.

15. *Id.* at 694.

16. ROBERT CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974).

17. *Id.* at 1108–09.

The best friend he made through sports was Jerry Kramer, with whom he would co-write four books and nearly a quarter-million words.¹⁸ In 1967, my father decided to collaborate on an insider's look at the National Football League with Kramer, the Packers' all-pro right guard. The book would be a diary of Kramer's 1967 season, as he and his teammates defended the NFL championship they won in Super Bowl I, which was their fourth title in six years.¹⁹

Their timing was perfect. In the conference championship game, the immortal Ice Bowl, the Packers defeated the Dallas Cowboys and Kramer made the crucial play, the block that allowed Bart Starr to score a touchdown on a quarterback sneak with thirteen seconds remaining. In his autobiography, *Flashing Before My Eyes*,²⁰ my father recalled the aftermath of the block:

In the locker room after the game, Kramer, enjoying his unfamiliar role as hero, stood before the television cameras while CBS ran and reran and reran the slow-motion pictures of Starr's touchdown, and Kramer's block. Millions of Americans came to know Jerry Kramer's name for the first time from one crisp, timely block. "Thank God for instant replay," Kramer said, and we had our title: *Instant Replay: The Green Bay Diary of Jerry Kramer*.²¹

My father met Kramer in the early 1960s, when he was writing his second book on Paul Hornung the Packers' star halfback. He thought Kramer was bright and literate, the perfect collaborator. The Packers not only won the 1967 NFL championship, they also won Super Bowl II, 33-14, against the Oakland Raiders, the champions of the American Football League. That is where the book ends.

III. FINDING THE ATHLETE'S VOICE

Soon after its publication in the Fall of 1968, *Instant Replay*²² became the best-selling sports book ever. Better than any previous sports book, or

18. See, e.g., JERRY KRAMER & DICK SCHAAP, *INSTANT REPLAY* (1968) [hereinafter *INSTANT REPLAY*]; JERRY KRAMER & DICK SCHAAP, *DISTANT REPLAY* (1985) [hereinafter *DISTANT REPLAY*].

19. *INSTANT REPLAY*, *supra* note 18.

20. DICK SCHAAP, *FLASHING BEFORE MY EYES: 50 YEARS OF HEADLINES, DEADLINES AND PUNCHLINES* (2001).

21. *Id.* at 147-48.

22. *INSTANT REPLAY*, *supra* note 18.

any since, it captured the peculiar milieu of the locker room, the combination of machismo and male bonding rituals that rule the locker room.

I sat in front of my locker, and I talked and talked and talked. I talked about the mistakes we made during the first half. I talked about the spirit of our team. I talked about Lombardi. . . . I told anecdotes and I told my opinion of just about everything, and after a while I noticed that most of my teammates were dressed and were starting to leave the locker room. I was still in my uniform, still perched in front of my locker, I really didn't want to get up. I wanted to keep my uniform on as long as I possibly could.²³

Instant Replay was an unvarnished look inside the world of the NFL, to a point. It was not an expose, or salacious, nor even mildly off-color. Unlike *Ball Four*,²⁴ the groundbreaking baseball diary Leonard Schechter and Jim Bouton published in 1969, *Instant Replay* did not tell tales out of school. *Ball Four* debunked. *Instant Replay* glorified. Each was honest in its own way.

The success of *Instant Replay* made my father the collaborator of choice for America's best athletes. His subsequent collaborators included New York Jets' quarterback Joe Namath;²⁵ New York Mets' pitcher Tom Seaver;²⁶ New York Knicks' forward Dave DeBusschere;²⁷ pro golfer Frank Beard;²⁸ all-time home run king Hank Aaron;²⁹ pro football Hall of Famer Joe Montana;³⁰ two-sport sensation Bo Jackson;³¹ New York Giants' quarterback Phil Simms;³² and tennis coach Nick Bollettieri.³³

In the early seventies, when my father wrote books with Namath, Seaver, Kramer, DeBusschere, and Beard, the money generated by a literary success was still enticing for athletes. Even the most highly compensated

23. *Id.* at 281 (Jerry Kramer speaking of his experience after a big game).

24. JIM BOUTON, *BALL FOUR* (1970).

25. JOE NAMATH & DICK SCHAAP, *I CAN'T WAIT UNTIL TOMORROW . . . 'CAUSE I GET BETTER-LOOKING EVERY DAY* (1969).

26. TOM SEAVER & DICK SCHAAP, *THE PERFECT GAME: TOM SEAVER & THE METS* (1970).

27. DAVE DEBUSCHERE, *THE OPEN MAN: A CHAMPIONSHIP DIARY* (1970).

28. FRANK BEARD, *PRO: FRANK BEARD ON THE GOLF TOUR* (1970).

29. HANK AARON & DICK SCHAAP, *HOME RUN: MY LIFE IN PICTURES* (1999).

30. JOE MONTANA & DICK SCHAAP, *MONTANA* (1999).

31. BO JACKSON & DICK SCHAAP, *BO KNOWS BO* (1990).

32. PHIL SIMMS & DICK SCHAAP, *SIMMS TO MCCONKEY: BLOOD, SWEAT, AND GATORADE* (1988).

33. NICK BOLLETTIERI & DICK SCHAAP, *MY ACES, MY FAULTS* (1997).

athletes could still really use the money from a successful literary venture. Kramer, for instance, made far more money from *Instant Replay* than he did playing for the Packers. Therefore, my father could pick and choose those athletes with whom he wished to work.

My father's first post-*Instant Replay* collaboration was with Namath, who allowed my father to have a lot of vicarious fun. Namath was the biggest star in sports in 1969, when together they wrote, *I Can't Wait Until Tomorrow . . . 'Cause I Get Better Looking Every Day*.³⁴ The book chronicled the Jets' 1968 season, which they capped by winning Super Bowl III against the heavily favored Baltimore Colts. It also documented, gently, Namath's swinging lifestyle, with off-hand references to booze and broads, in the vernacular of the book.

The book perfectly captured Namath's swagger, as evidenced in these few paragraphs about Super Bowl III.

The only thing that really upset me all day was that, after the game was over and we'd won, 16-7, we didn't have any champagne in our locker room. That was just plain ridiculous. [Jets coach] Weeb [Ewbank] and Milt Woodard, the president of the American Football League, said that it wouldn't look right on television for us to be drinking, that it'd be bad for our image, bad for the sport, a bad influence on children. They were acting childish themselves. It was pure hypocrisy, and hypocrisy hurts our image a lot more than a couple of glasses of champagne. We were the champions, man, the best in the world, and we had Cokes and Gatorade to drink. The whole thing left a bad taste in my mouth. I washed it out later with Johnnie Walker.

I had some night. I stayed up till the sun rose the next day. Hell, I'd been getting too much sleep all week, anyway. We were on top of the world. Number one. We were number one. Sometimes for no reason at all, I just broke out laughing. I felt so good. On television that night, I watched the replay of the game. Some people were already saying that if we played the Colts again on another day, the result would be different. I watched the game on TV and saw how conservatively I'd played, how I went for field goals instead of touchdowns, and I guess I had to agree with those people. On another day, we would have beat Baltimore worse.³⁵

34. See NAMATH & SCHAAP, *supra* note 25.

35. NAMATH & SCHAAP, *supra* note 25, at 69.

They were very different: Namath, the glamorous quarterback and ultimate bachelor, and Kramer, the anonymous, gritty lineman and family man. But my father captured each of their voices perfectly. Reading *Instant Replay* and *I Can't Wait Until Tomorrow*, you can hear Kramer and Namath, not my father, which is the ultimate tribute to him as a collaborator.

My father not only captured the voices of his co-authors, but their personalities as well—their strengths, weaknesses and fears. With Dave DeBusschere, my father wrote *The Open Man*,³⁶ the story of the New York Knicks' first championship in 1970. The Knicks' coach, Red Holzman, liked to say “[l]ook for the open man,” and the title of the book was a play on those words. More than most sports biographies, it revealed its subject honestly and poignantly. Again, my father and his subject are describing what it feels like to have just won a championship:

I ran down the corridor toward our locker room, past the tangle of cables and lights and television cameras, cradling the basketball. I didn't know what I was going to do with it. All I knew was that the ball represented everything we'd worked for since September, everything I'd worked for, really, since I first started playing basketball.³⁷

DeBusschere then described how he felt a few hours later: “I [laid] down and tried to sleep, but I couldn't. My heart started pounding, louder than I'd ever heard it before. For more than an hour, I lay and listened to my heart, thumping so hard, my T-shirt was palpating.”³⁸

In his foreword to *Sport*, a collection of my father's writings, Breslin wrote, “[s]o typical of Schaap, he ends a story of victory with DeBusschere lying in bed, chest pounding, frightened that he [was] having a heart attack.”³⁹ Even as my father was pumping out book after book, his friendships with the athletes he profiled flourished. Somehow, he gave both the athletes and the readers who bought his books what they wanted. It has to do with fairness as well as skill. He showed the readers a world they had never seen before, but he did not sensationalize. He rarely, if ever, took cheap shots, and he rarely, if ever, told a juicy story at the expense of someone else. There was, however, an edge to his prose, and an honesty that endeared his writing to his subjects, the critics and the public.

36. DEBUSCHERE, *supra* note 27.

37. *Id.* at 263.

38. *Id.* at 265.

39. DICK SCHAAP, *SPORT X* (1975).

As a ghostwriter for thirty years, my father worked with many of the biggest names in sports. He was disappointed that Muhammad Ali chose someone else to co-author his autobiography, but he understood. Ali was, in effect, required to collaborate with a member of the Nation of Islam. There were only a few other subjects who declined my father's advances, Frank Sinatra and Joe DiMaggio, and they declined everyone's request.

My father knew Sinatra fairly well. Sinatra was, my father told me, the only person he let call him "Dickie." My father wrote a column for the *Herald Tribune* about a literary party Sinatra attended. He loved the last line: "The frugging at the Gate wasn't the same after Sinatra left. It must have been like that at the Mermaid after Shakespeare left."⁴⁰ DiMaggio my father knew better. My father reflected on their relationship in his autobiography:

In later years, as I got to know him better, I tried to persuade DiMaggio to allow me to collaborate with him, as I had with other athletes, on an autobiography. He declined, of course, fiercely guarding his privacy, but once, when we both happened to be eating breakfast in a Marriott hotel near Fisherman's Wharf in his hometown of San Francisco, he teased me, saying, "I'm almost ready." And then he smiled, and I smiled, both of us knowing he would never be ready to share the intimate details of his baseball career or his equally sensational marriage—to Marilyn Monroe. From then on, whenever I saw him, once or twice a year, I'd ask, "Are you ready now?" and we'd both smile.⁴¹

Everyone with whom my father wrote a book was a superstar, except Tom Waddell. My father got to know Waddell as he was dying of AIDS in 1987, profiling the one-time Olympic decathlete for *20/20* and *Sports Illustrated*. Though they knew each other only briefly, my father and Waddell became very close. My father saw in Waddell—a college football and gymnastics star, an Olympic decathlete, an Army paratrooper, a successful physician, and the founder of the Gay Games—the versatility and courage that he had always admired.

My father, like most men of his generation, or of any generation, was at least somewhat homophobic, which he admitted in several stories he wrote about his relationship with Waddell. He often said that by getting to know Waddell, who was about as macho as a gay man could be, he overcame his

40. *Id.* at 274.

41. SCHAAP, *supra* note 20, at 14–15.

homophobia. As Waddell lay dying, he and my father decided that my father would tell his story, in autobiographical form, posthumously. It would turn out to be a Herculean task, of Odyssean length. He spent nine years, on and off, writing it.

When it was finally published, he told the *San Francisco Examiner* he never had a book “mean so much to me. This was the first person I’d collaborated with that I couldn’t call up and ask what happened next. We only worked in the last year of his life and Tom’s memory was beginning to go in the end.”⁴²

Describing his inability to finish the project, my father told the *Examiner*:

I wanted this book to be so good. I wanted it to live up to him. With all the famous people I’ve written with—Joe Namath, Joe Montana, Bo Jackson, Billy Crystal—there was never any pressure from any of them to get it done. But with Tom, who was dead, I felt somehow he was looking over my shoulder and if I didn’t do it perfectly, somehow if he wasn’t going to punish me, I was going to punish myself.⁴³

Gay Olympian,⁴⁴ as the book was called, was a critical, but not commercial, success. My father, however, never regretted the effort he put into writing it. Waddell was my father’s first gay co-author and he wanted to further expand his horizons. It bothered my father, who had championed civil rights and black athletes throughout his career, that he had never co-authored a book with a black athlete. He was close to Jim Brown, Muhammad Ali, Willis Reed, and Wilt Chamberlain—to name but a few of the prominent black athletes who were his friends—but he had never partnered with any of them.

In the late 1980s, he finally found a black athlete with whom he would co-author an autobiography.

[My] relationship with Bo Jackson is special. Bo is special. In the *SportsCentury* poll for the athlete of the twentieth century, I voted Bo number one, just ahead of Jim Brown and Wilt Chamberlain, well ahead of Michael Jordan and Babe Ruth, an opinion shared by

42. Cynthia Robins, *Gay Games Champion Tom Waddell’s Courageous Story Took Perseverance to Tell*, S.F. EXAMINER, July 30, 1996, at C1.

43. *Id.*

44. TOM WADDELL & DICK SCHAAP, *GAY OLYMPIAN: THE LIFE AND DEATH OF DR. TOM WADDELL* (1996).

none of the other forty-seven voters. But for pure athleticism, which was supposed to be the *SportsCentury* gauge, for sheer speed, strength, and agility, Bo was the best I ever saw.⁴⁵

My father would go on to write another autobiography—this one relatively brief, to accompany some beautiful photographs—with another black athlete from Alabama, Hank Aaron. It begins:

I am in awe of the great home-run hitters, the ones who are no longer with us. The Reverend Dr. Martin Luther King, for one. Jackie Robinson, for another. Forget about Babe Ruth and Roger Maris. Forget about Mark McGwire, Sammy Sosa and Ken Griffey Jr. Forget about Hank Aaron. King and Robinson. They're the real home-run hitters.⁴⁶

Just as my father captured the voice of Jerry Kramer—the WASP from Idaho—and Joe Namath—the Catholic from western Pennsylvania—and Tom Waddell—the gay San Franciscan—he found Bo Jackson and Hank Aaron's voices, too.

IV. BIG MONEY CHANGES EVERYTHING

There are several primary reasons the climate has changed. First and foremost: money. Big money has changed everything. Before the advent of free agency in the mid-1970s, sports were covered primarily as recreation and athletes' salaries were, for the most part, deemed immaterial. With rare exception, sports stars were tremendously underpaid because there was no free market bidding for their services. Reporters knew just how poorly management treated players and were generally sympathetic. It was difficult to criticize a struggling athlete when you knew he was not being justly compensated in the first place. Now, when the average salary for a major league player is more than \$2,000,000 per year, fans and reporters expect more. Athletes are expected to play to the level of their paychecks.

Money is also a factor in the sense that athletes and the people who cover them are no longer in the same class of wealth. Reporters and athletes once spent much of their time together. Hall of Fame first baseman Lou Gehrig's best friend was not a fellow player, but a reporter; the same for pitcher Don Larsen and countless others. Until the 1970s, it was quite

45. SCHAAP, *supra* note 20, at 280.

46. AARON & SCHAAP, *supra* note 29, at 4.

common for some reporters, especially columnists, to be more highly compensated than the athletes they covered. Now, the twelfth man who sits at the end of the bench for a National Basketball Association team makes more money in a single season than most reporters will make in twenty years on the beat. Reporters and athletes rarely see each other after the game because the reporters, literally, cannot afford to frequent the same establishments. Also, it is not easy for the wealthy athlete to relate to the middle-class journalist. Their lives are completely different.

With the infusion of big money into our games, sports are covered as a business. Labor strife is, in baseball at least, a constant. Newspapers report every player's salary. The negotiations between leagues and networks to determine rights fees are avidly covered. The sports business beat is among the most coveted in major newspaper sports sections. The games are so often secondary to the economics.

Money has also isolated the athlete-millionaires from average fans. The fans, who pay the enormous salaries by purchasing \$50 baseball seats and \$200 hockey seats and \$8 beers, are now less reverent and more demanding. Their point of view is reflected in the media.

My father wrote an essay in 1992 for the seventy-fifth anniversary edition of *Forbes*.⁴⁷ Reflecting on the changing nature of big-time sports in America, he wrote:

The stakes are so high now. The *average* major league baseball player earns more than a million dollars a year. Losing pitchers and feeble hitters, men with stunningly modest statistics, demand much more. Steve Greenberg, the deputy commissioner of baseball, used to be an agent, negotiating players' contracts. He once told his father, Hank Greenberg, the Hall of Famer, who was the first ballplayer to earn \$100,000 in a season, that he was representing a certain player. "What should I ask for?" Steve said. "He hit .238."

"Ask for a uniform," Hank said.

Steve shook his head. "Dad," he said, "you just don't understand baseball any more."

Nobody understands baseball any more. No one relates to the salaries, not even the players themselves. They earn so much more than they ever dreamed of.⁴⁸

47. Dick Schaap, *So Much of the Joy Is Gone*, FORBES, Sept. 14, 1992, at 86.

48. *Id.*

V. THE ATHLETE-REPORTER GAP

The sports media and athletes have grown apart for other reasons, too. Sports journalism was, until fairly recently, more trade than profession. Its ranks were filled primarily by men who were once copyboys and educated primarily on the job. They were hard men, who spent their lives on the road. Alcohol was a constant. Certainly, there were exceptions. Grantland Rice, a Vanderbilt graduate, and Red Smith, a Notre Dame graduate, were probably the most widely read and respected sports columnists ever. However, today's sports writers are much more likely to be sons and daughters of college graduates than the contemporaries of Rice and Smith. They are much more likely to have attended Ivy League schools. Virtually all of them have degrees in communications or journalism. They have so little in common with athletes who are largely unscarred by higher education and were raised poor, in single-parent households.

Race and ethnicity are also factors contributing to the widening divide between athletes and reporters. The vast majority of professional football and basketball players are black.⁴⁹ The vast majority of the men and women who cover them are white. In baseball, forty percent of the players speak English as a second language, if at all. None of this has brought players and reporters closer.

Then there is the Watergate/Vietnam phenomenon. All journalism changed with Watergate and the war in Vietnam. Virtually all reporters, and most Americans, became more cynical and more suspicious of public figures. If the President was a crook, then no one was trustworthy. It was not good enough any more to take people at their word. The presumption now is that we are being spun—by politicians, by movie stars, by athletes—and the reporter's job is to expose the lies and distortions. We no longer expect the media to treat star athletes gently; we expect the truth, which athletes quite frequently prefer not to have revealed. In fact, when Jim Bouton wrote *Ball Four*,⁵⁰ his warts and all groundbreaking account of life

49. For example, of the fifteen players on the 2002–2003 Miami Heat roster, thirteen were black. The other two players were from New Zealand (Sean Marks) and the Republic of Georgia (Vladimir Stepania). On the three-time defending world champion Los Angeles Lakers, eleven of the thirteen players were black. Again, one of the non-black players was foreign-born, Stanislav Medvedenko, from the Ukraine. In the NFL, the 2002 Super Bowl Champion New England Patriots fielded thirty-nine black players and twenty white players in the 2002–2003 season. On the extended roster for the Miami Dolphins, forty-four players were black while twenty-two players were white.

50. BOUTON, *supra* note 24.

as a major league pitcher in the 1960s, he was shunned. In many baseball circles, he still is shunned.

Today's fans find it difficult to warm to players who are transient—Braves and Rams who next year are just as likely to be Rangers and Colts. Today's reporters cannot, for the same reason, build long-term relationships with those they cover.

Remember this, too: Until the advent of cable television, very few games—other than NFL games—were on national television. Athletes who craved celebrity needed writers to publicize them. Now, with virtually every game they play televised and with all their outstanding plays featured in highlights on national shows such as ESPN's *SportsCenter*, the athletes do not need the reporters. In fact, they have little to gain and much to lose by accommodating the media.

VI. CONCLUSION

My father captured the voices and spirits of many. He found their voices because he cared about them. Jimmy Breslin put it best in his foreword to *Sport*: “The sport Dick Schaap always has covered is the contest called living.”⁵¹

51. SCHAAP, *supra* note 39, at ix.

What If Nancy Reagan's Astrologer Had Sued? An Essay by Barrett Seaman*

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I. INTRODUCTION

The revelation in the final months of Ronald Reagan's presidency that First Lady Nancy Reagan relied on the prognostications of an astrologer to help determine her husband's schedule—including the timing of his signature on a major arms control treaty with the Soviet Union—was itself hardly the fruit of journalistic enterprise. That essential detail, which titillated the nation in May of 1988, was handed to the press on a platter, as it were. Actually, it was not on a platter, but rather in a plain brown cardboard box containing the manuscript of Donald T. Regan's White House memoir entitled, *For The Record*.¹ I can attest to that, as I was the recipient of that box—delivered to me by the book's publisher, Harcourt Brace Jovanovitch. I was to read it, and recommend to my editors at *Time Magazine* whether *Time* should purchase the rights to run excerpts in the magazine, prior to the book's publication later that year.

Don Regan, who had been President Reagan's Treasury Secretary, then his Chief of Staff, was ousted from this last job in February 1987, in a "palace coup" that was widely believed to have been engineered by Nancy Reagan herself. Less than a year and a half later, Don Regan's revenge was

* Barrett Seaman, a visiting Goodwin Professor in February, 2002, retired in 2001 after a thirty-year career as a correspondent and editor of *Time Magazine*. In addition to assignments in New York, Chicago, Bonn, Germany, and Detroit, he served as *Time's* Senior White House Correspondent from 1984–88, covering the second term of Ronald Reagan's presidency. He also served as *Time's* Special Projects Editor from 1994 to 2001, and was responsible for many of *Time's* special editions and reports. He is the coauthor, along with Michael Moritz, of *Going For Broke: The Chrysler Story*, (Doubleday, 1981) about the near-death experience of the nation's third largest auto company. He is currently working on another book.

1. DONALD T. REGAN, *For the Record*, TIME, May 16, 1988, at 26.

ripe and ready for picking. Because *Time* was the first periodical approached by the publisher,² and because I, as the magazine's Senior White House Correspondent, covered the Reagan/Regan White House during his tenure, I was handed an instant "scoop" that seemed certain to make a big splash.

Don Regan certainly knew the news value of what he had. The opening anecdote on the very first page of his three hundred ninety-seven page book described how Mrs. Reagan allegedly tried to influence the timing of her husband's surgery for colon cancer based on advice from her astrologer—"a woman in San Francisco," as Don Regan reported.³ In fact, that is all Don Regan knew about the woman, otherwise known as the First Lady's "Friend."⁴ His story was about the consequences of what he saw as meddling with the affairs of state which he, as Chief of Staff, saw as his, and her husband's, purview.⁵ His goal in exposing this bit of sensation was to explain why working in the White House during Reagan's second term, a critical period which encompassed the high drama of the Reagan/Gorbachev summit meetings leading to the end of the Cold War as well as the sometimes farcical shenanigans of the Iran-Contra affair, had been so difficult for him.

My recommendation to *Time*'s editors was, as they say, "a no-brainer:" they should buy the rights to excerpt the book. It was not merely a matter of titillation. Don Regan's book contained valuable insights into the Reagan presidency. Additionally, the allegation that an astrologer played a role in the timing, if not the substance, of policy was, in and of itself, indisputably newsworthy. The job then fell to Executive Editor Ronald Kriss and myself to target the most relevant and interesting sections, and meld them together into a package that would run over thirteen pages in *Time*.⁶

The other job, one that fell largely to me, was to both confirm and elaborate on Don Regan's account—to bring some added journalistic value to the story. Journalistic value that would include some commentary, which would put Don Regan's obviously personal—and therefore biased—recollections into perspective. However, I felt it should also include whatever additional information *Time* could provide about the influence of Mrs. Reagan's astrologer friend, and the opinions of other administration

2. This was partly attributable to Regan's thought that *Time*'s coverage of him had been more balanced than that of its arch rival *Newsweek*.

3. REGAN, *supra* note 1, at 26.

4. *Id.*

5. *Id.*

6. Barrett Seaman, *Good Heavens!*, TIME, May 16, 1988, at 25.

officials as to its impact on policy and history—which, after all, is what journalism should be about. Among my key questions: Who was this “Friend” whose parsings of the heavens had, by Don Regan’s account, wreaked such havoc on the President’s schedule and, in the case of the White House’s response to the Iran-Contra scandal, arguably affected Reagan’s political standing?

II. FINDING JOAN QUIGLEY

Privacy is an issue that seldom enters the calculus of journalists covering the White House. The law firmly establishes that virtually anyone—including the First Lady—associated with the place is a “public figure” whose actions and speech is deemed to be relevant to the affairs of state, and thus inherently “newsworthy.”⁷ Nancy Reagan’s belief in astrological powers—long-held, but deeply reinforced after Ronald Hinckley’s assassination attempt on her husband in March, 1981—was fair game for media scrutiny, as were all the actions and reactions by her husband’s staff.

However, if I were to discover the identity of the “Friend,” which I fully intended to do; would *Time*’s subsequent delvings into her personal life, her relationship with the Reagans, her character, constitute an invasion of her privacy? By exposing the “Friend” as the person who abetted what *Time* eventually characterized as Mrs. Reagan’s “more than a charming eccentricity,”⁸ would the magazine be liable for subjecting this otherwise private citizen to public ridicule?

To be candid, I did not think much about these questions as I began my efforts to “flesh out” the details of Don Regan’s allegations. I was much more concerned with protecting *Time*’s exclusive story. I found myself approaching White House sources in an almost conspiratorial fashion. I informed them, in private interviews, that I was aware of Nancy’s astrologer friend. I encouraged them to confirm what Don Regan had written, to reveal any new details they had about her influence, and to join with me, in essentially, a pact of silence that would keep a lid on the story until *Time* went to press. Under our agreement with Harcourt Brace Jovanovitch, publication would not happen until late June, so that it would precede the early summer publication of *For The Record*.⁹ In news-driven Washington,

7. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

8. Seaman, *supra* note 6, at 25.

9. Regan, *supra* note 1, at 26.

and around a White House that was covered by more than two hundred reporters on a regular basis, three months was a long time to sit on a scoop.

Many of the President's aides, who had been living with the explosive knowledge of Nancy's astrologer for years, were at first shocked to learn from me that Don Regan was to reveal the existence of the "Friend" in his book. All were loyal to the President and wanted to mitigate whatever damage the news might bring down on him. However, as human beings, the President's aides were also anxious to absolve themselves of any connection to the astrologer—and to use this opportunity to explain¹⁰ why their own jobs had been complicated by her influence. As such, they proved quite helpful in confirming—and even expanding on—what Don Regan had in his book.

Where the President's aides were unhelpful was on the issue that eluded Don Regan as well: who was this woman? This detail was a closely-guarded secret in the East Wing.¹¹ Only a handful of people knew. Moreover, no one who knew the identity of the "Friend" was willing to divulge it to me.

There was, however, one source, who I did not, and still will not, identify, who agreed to confirm the name if I were to come up with it independently. Thus, my search became somewhat like that of the miller's daughter-turned-queen in the fairy tale of Rumpelstiltskin.¹² In order to keep from being beheaded by the king, her husband, she needed to discover the name of the little man who could spin straw into gold.¹³ For me, the consequences of failure were not nearly so dire as they were for the miller's daughter; however, as a journalist, I was still determined to find her out.

The information available to Don Regan was certainly enough to get us started. Myself and a number of *Time* colleagues, who would become involved in this search, knew the astrologer was a female. We knew she was from San Francisco, and we could infer from Mrs. Reagan's references to her as "my friend" that she was very likely a woman of about the same age and social status. We were able to rule out the obvious, like the renowned

10. Either on "background" or "off the record," in the parlance of Washington journalism.

11. The East Wing is a term used to describe the residential side of the White House and the First Lady's staff—as distinct from the West Wing, where the President's top assistants worked.

12. See, e.g., NEIL PHILIP, FAIRY TALES OF THE BROTHERS GRIMM 68–73 (1997).

13. *Id.*

Jeanne Dixon, who had once advised both Reagans on their charts,¹⁴ and Joyce Jillson, a seer whose clients tended to be Hollywood types.¹⁵

I did have one additional clue that Don Regan did not: a source told me this “Friend” had attended a state dinner at the White House sometime during Reagan’s second term, which began in January of 1985. There had been only about half a dozen formal occasions held to honor heads of state in Washington on official visit, leaving somewhere in the range of 120 to 130 guests at each function. Thus, it was not an onerous task to comb through the records to see if an otherwise unidentified woman from San Francisco was on one of the lists.

The next step was to make use of *Time*’s extensive network of bureaus, one of which was in San Francisco. Briefed on what little information I had, bureau chief Paul Witteman assigned one of his best “stringers”¹⁶ to the story. Reporter Dennis Wyss began searching the city’s newspaper society columns and periodicals that might include coverage of astrology, as well as interviewing astrology buffs and local friends of the Reagans.

With just two weeks remaining before the issue of *Time* in which the Regan book excerpts and related news stories were scheduled to run, other news organizations began to speculate about what the book might reveal. While several papers hinted that astrology might be involved, by late April, no one yet had the story. I, however, grew increasingly concerned that other media organizations were getting hot. I advised Ron Kriss and other New York editors that, in my view, it would be prudent to push our story up a week so that it came out on Monday, May 9, instead of on May 16. Though the arduous task of excerpting and fitting Regan’s own words was not yet completed, they agreed it was worth a sprint to the finish to preserve our exclusive story.

Meanwhile, Dennis Wyss was honing in on a couple of likely prospects for Mrs. Reagan’s “Friend.” On Friday, May 6, the *San Francisco Chronicle* ran a short item speculating that Nob Hill socialite Joan Quigley, who coincidentally was a friend of the Reagans, had written several books on astrology and might have been advising the White House.¹⁷ Paul Witteman called me in Washington to see if her name checked out on any of the White House guest lists. It did. Joan Quigley, according to White House records,

14. Laurence Zuckerman, *The First Lady’s Astrologer*, TIME, May 16, 1988, at 41.

15. *Id.*

16. Stringers are professional journalists not directly employed by the magazine but used on an as-needed basis to supplement the work of *Time*’s correspondents.

17. Ruthe Stein, *The Star Gazers Among Us: They Pick Wedding Dates, Make Career Moves by Horoscope*, S.F. CHRON, May 6, 1988 at B3.

was in attendance at the April 1985 state dinner honoring the visiting President of Algeria.¹⁸

We had two more reporting days left before the close of the May 16 issue.¹⁹ That was not much time in which to check out this vital piece of information, or to find out whatever else we could about Joan Quigley, and, if possible, to talk to her. My first step was to try to reach the source who had promised to confirm her name if we came up with it independently. That proved moderately difficult, as the source was traveling and not easily reachable. Shortly after two o'clock Friday afternoon, my office phone rang and a familiar voice asked what I had. "Joan Quigley," I said. "How did you find her?" was the reply. Given my past, mutually-trusting relationship with this source, that was confirmation enough for me.

Finding Joan Quigley in person proved to be more challenging. It was critical for us to have not only corroborating information that she was the soon to be the notorious "Friend" of the First Lady, but also for us to hear from Ms. Quigley herself. However, she was out of the country—in London, it seemed—and not due back in San Francisco until late Saturday, when the magazine would be all but put to bed.

Dennis Wyss set about interviewing Quigley's Nob Hill friends and neighbors. Researchers in our New York headquarters dug up everything they could on Ms. Quigley—her graduation from Vassar in 1947,²⁰ her initial involvement in astrology,²¹ her several books on the subject,²² and evidence of her connection with the Reagans. Meanwhile, New York stringer Wayne Swoboda tracked down what flight Quigley and her traveling companion were on from London to New York. He then managed to book himself onto the New York-to-San Francisco leg of the trip and interview the astrologer. When the plane landed in San Francisco, Bureau Chief Paul Witteman and stringer Dennis Wyss were there to greet them.

18. The White House maintains public records of the guest lists of all official functions, including state dinners. In 1988, all a reporter had to do was check the White House Press Office's files for the guest lists of state dinners. Nowadays, these lists are available on the White House web site.

19. Issues are always dated one week after the Monday on which they actually hit newsstands.

20. Seaman, *supra* note 6, at 25.

21. *Id.*

22. See generally JOAN QUIGLEY, WHAT DOES JOAN SAY?: MY SEVEN YEARS AS WHITE HOUSE ASTROLOGER TO NANCY AND RONALD REAGAN (1990).

III. THE STORY

The result for *Time* was a fifteen-page package, introduced by a story I wrote attempting to put these revelations in perspective.²³ Then came Regan's excerpts, followed by a one page story identifying Quigley.²⁴ It recounted her first fascination with astrology, her role as a columnist for Seventeen Magazine, as well as her books and other public pronouncements on the subject.²⁵ It was rich with biographical detail and included the following paragraphs. Joan Quigley was described as:

Thin and well-coiffed, Quigley, sixtyish, is not unlike many of the First Lady's California friends. The daughters of John B. Quigley, a San Francisco hotelier and prominent Republican, Joan and her sister Ruth grew up in a penthouse suite overlooking Union Square. Although both were noted for their beauty, neither married. Today the sisters reside in a luxurious cream-color apartment building atop exclusive Nob Hill. Both are fixtures at local theater openings and society fund raisers. "Joan is elegant, witty, articulate and strikingly pretty," says her friend Beatrice Bowles. But another acquaintance of 20 years who requested anonymity describes Quigley as "conservative, very private and a little wacky."²⁶

The story went on to quote Quigley herself extensively on her astrological philosophy. However, it also noted that

[s]everal fellow astrologers are decidedly cool toward Quigley. Marion D. March, who prepares charts for many Hollywood stars, dismisses her as a "media astrologer" because of her many TV appearances. Others in the astrological community grouse that Quigley is too aloof. But Jayj (sic) Jacobs, another San Francisco practitioner, asks, "If she's doing astrology for the Reagans, what does she need with the rest of the community?"²⁷

While *Time's* tone was respectful, there was no missing an overall assumption of skepticism in both my piece and the Quigley piece, which was written by New York staff writer Laurence Zuckerman, based on reporting

23. Seaman, *supra* note 6, at 25.

24. Regan, *supra* note 1, at 26.

25. Zuckerman, *supra* note 14, at 41.

26. *Id.*

27. *Id.*

by stringers Wyss and Swoboda. The kicker of the story noted that “[a]ccording to a friend, Quigley had been predicting for months that a major earthquake would rock San Francisco on May 5. . . [b]ut, May 5 came and went with nary a tremble—except perhaps on Quigley’s personal Richter scale. That was the last day of blissful anonymity for the First Lady’s astrologer.”²⁸

When the May 16 issue of *Time* hit the streets on Monday, May 9, there was plenty of reaction. The President himself directed his ire not at *Time* but at Don Regan. “From what I hear, he’s chosen to attack my wife, and I don’t look kindly on that at all,” he said.²⁹ From San Francisco, where hordes of reporters descended upon Joan Quigley’s Nob Hill apartment, there was not so much as a peep of protest from the astrologer herself.

IV. QUIGLEY’S RIGHT TO PRIVACY

However, what if an enterprising personal injury lawyer had gotten to Joan Quigley and convinced her that she had a case against *Time*? After all, she resided in California, where, lawyers tell me, the courts have been comparatively liberal in their willingness to entertain cases that test all four of Prosser’s categories for privacy invasion.³⁰ One currently before the courts³¹ involves a little league baseball team whose coach had been accused of sexually molesting as many as half a dozen of his current players.³² *Sports Illustrated*, a sister publication of *Time*, ran a photograph of the entire team.³³ That prompted three separate groups to sue: 1) several players pictured, who had *not* been molested, on grounds that the photo linked them to teammates, who *had been* molested, thereby casting them in a false light; 2) two assistant coaches on similar grounds of false light; and 3) some of the actual victims, for invasion of privacy.³⁴

Some legal observers are surprised the California courts even allowed the case to go forward, especially since the coach himself is already serving an eighty-four year sentence, having admitted to molesting over two hundred

28. *Id.*

29. Seaman, *supra* note 6, at 25.

30. *See generally*, PROSSER & KEETON, THE LAW OF TORTS (5th. Ed. West 1984). The four categories are 1) appropriation; 2) public disclosure of private facts; 3) false light; and 4) intrusion. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

31. *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504 (Ct. App. 2001).

32. *Id.* at 506.

33. William Nack & Don Yaeger, *Every Parent's Nightmare*, SPORTS ILLUSTRATED, Sept. 13, 1999, at 40.

34. *M.G.*, 107 Cal. Rptr. 2d at 507.

boys during a thirty-year coaching career.³⁵ If that case can be heard in California, might not Joan Quigley have had a chance to give *Time* a hard time? If so, then what could she possibly claim? She could not claim that 1) *Time* had falsely identified her as Nancy Reagan's astrologer; Ms. Quigley herself confirmed that essential truth;³⁶ 2) any embarrassing facts about her private life had been exposed; 3) any commercial rights had been misappropriated; or 4) *Time*'s public exposure of private facts caused any discernible harm to Ms. Quigley, or her career.³⁷

Matters might have been different, however, if *Time*'s reporting had turned up and published, more personal details about Quigley's life.³⁸ For example, what if, the magazine had, in its search for a fuller picture of Ms. Quigley's San Francisco lifestyle, learned that the Nob Hill society matron was more than a spinster—that she was gay?

Let us assume, for the sake of argument, that reporter Wyss was told that very thing by several sources—or maybe even by the quoted blind-source; and that he filed it to *Time*'s New York writers and editors. Let us also assume³⁹ that *Time*'s editors deemed her sexual orientation to be a newsworthy detail, and had included it in the story. Would that not constitute the kind of public disclosure of a private fact that would warrant a lawsuit?⁴⁰

The California Court of Appeal heard a similar case brought by Oliver "Bill" Sipple against the *San Francisco Chronicle*,⁴¹ its renowned columnist

35. While working on this article, the author contacted three prominent first amendment lawyers who, speaking off the record, remarked on the peculiar situation this case presented.

36. Zuckerman, *supra* note 14, at 41. Ms. Quigley confirmed this allegation.

37. Probably the best evidence of this is in Quigley's book, by looking merely at the title and how she recounts how *Time*'s reporter approached her on the plane from New York to San Francisco and asked for an interview. See Quigley, *supra* note 22, at 21–22. Quigley says she granted it, in spite of Nancy Reagan's adamant admonition that she should not reveal her identity. The publication of the book is, to me, anyway, *prima facie* evidence that Quigley did not suffer from *Time*'s exposure, and in fact materially benefited from it. *Id.*

38. The notion of stipulating a potentially more complicated—hence interesting—legal scenario was suggested to me by Bruce Sanford, a First Amendment attorney with Baker & Hostetler, based in Washington, DC.

39. I make this a hypothetical assumption since it would have been unusual for a conservative Republican White House to be relying on the stargazing prognostications of a lesbian.

40. The elements needed to establish a case for invasion of privacy depends on state law, but it is generally a cause, for publishing facts that are offensive and not newsworthy. *Cape Publ'ns, Inc. v. Hitchner*, 549 So. 2d 1374, 1377 (Fla. 1989).

41. *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665 (Ct. App. 1984).

Herb Caen, and a number of other newspapers that picked up on the story in 1975.⁴² Sipple was the man who reached through a crowd and grabbed the arm of Sara Jane Moore, foiling her attempt to assassinate President Gerald R. Ford.⁴³ Suddenly and involuntarily thrust into the public limelight, Sipple drew national coverage as an ordinary man who became an uncommon hero.⁴⁴ However, Caen's column went further than just extolling his heroism; it reported that the ex-marine was a familiar figure in San Francisco's gay bar scene.⁴⁵

Sipple's subsequent suit alleged that the paper published this intimate detail of his personal life without his consent; and that it caused him personal anguish because, among other outcomes, his parent, brothers, and sister learned of his homosexuality for the first time in the public domain.⁴⁶ His lawyers argued that Caen's story met the criteria for a tortious act.⁴⁷ It constituted public exposure.⁴⁸ His sexual preference constituted a private fact.⁴⁹ The consequences of its revelation were offensive and objectionable to a reasonable person.⁵⁰ Moreover, this particular detail of his private life was of no legitimate public concern.⁵¹ The trial court initially agreed to hear the case, rejecting the defendant's Motion for Summary Judgment.⁵² Eventually it reversed that position, based on facts revealed during the discovery process, and Sipple appealed.⁵³

Ultimately, the California appeals court agreed with the lower court ruling, and dismissed the action.⁵⁴ In its opinion, the court ruled that Sipple's sexual preference was not a private fact, since his homosexuality was widely known in San Francisco's gay community.⁵⁵ It further rejected the plaintiff's contention that this detail had no news value, arguing that its

42. *Id.* at 666.

43. *Id.* 201 Cal. Rptr. at 666.

44. *Id.*

45. *Id.*

46. *Sipple*, 201 Cal. Rptr. at 667.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Sipple*, 201 Cal. Rptr. at 667.

52. *Id.*

53. *Id.*

54. *Id.* at 671.

55. *Id.* at 670.

revelation helped to dispel the stereotype that all homosexuals are timid, weak, or unheroic.⁵⁶

Because the courts' standards of newsworthiness are so broad, it seems likely to me that Joan Quigley, faced with a similar revelation by *Time*, would have fared no better in court than Mr. Sipple. If we assume, again hypothetically, that she was more discreet than Sipple and did not hang around gay bars, her claim of the disclosure of a private fact might be strengthened. Further, if publication of her sexual proclivity had caused Nob Hill to shun her, or prompted a prominent charity to throw her off its board, she would have a stronger case that the publication had caused her material harm.⁵⁷ If her lawyer was able to open that argumentative thread, could she not dip back into the mainstream arguing that her consultative relationship with the First Lady was itself a private fact worthy of protection?

V. CONCLUSION

What disturbs me, as a journalist, is the lack of clarity in the concept of false light. It strikes me, both in the *Sipple* case and in the hypothetical case of Joan Quigley's sexual tendencies, that the definitions of what is private and what is offensive and damaging are totally subjective. If *Time*, with the best of intentions, had erroneously printed a detail—any detail—about Quigley in the same article that revealed her hypothetical homosexuality, the magazine would, as I understand it, have left itself wide open to legal assault. Let us say that the same blind source responsible for describing Quigley as “a little wacky” had also reported that she was gay. Furthermore, let us also say a corroborating source for that piece of information was another astrologer who could be construed as a competitor. Could Quigley's lawyer not argue that this was both false and malicious?

Fortunately for *Time*, none of this happened. Also, based on my experience with the magazine, I doubt it would ever have transpired—even stipulating the hypothetical details described above. At the very least, given space constraints and the priority of other facts in the story, the editors would not likely have included details of Joan Quigley's sexual preference

56. *Sipple*, 201 Cal. Rptr. at 670.

57. Generally, to maintain an action for defamation a plaintiff must show a communication with four elements: 1) defamatory imputation; 2) malice or negligence; 3) publication; and 4) damages. See RESTATEMENT (SECOND) OF TORTS §558 (1977). If Quigley could show that she was shunned from her community or removed from a board because of the defamation, then she is more likely to prevail on her claim for invasion of privacy.

on grounds that the facts would not sufficiently enhance a story that was essentially about her influence on the affairs of state.

Indeed, what did transpire in the aftermath of the White House astrology story solidified Joan Quigley's status as a public figure. She, too, wrote a tell-all book exploiting her connections to the Reagans. It was entitled *What Does Joan Say?: My Seven Years as White House Astrologer to Nancy and Ronald Reagan*.⁵⁸ In the book, Quigley recounts her first encounter with *Time*:

The next morning, I took the Concorde to New York. After spending the night at an airport hotel, I was intercepted as I was about to board a plane to San Francisco by a young reporter from *Time* Magazine. He told me he had booked a seat on the plane at the last moment for the purpose of interviewing me. I decided to grant him the first interview.⁵⁹

If Joan Quigley was not a public figure before this voluntary exposure in the press, she certainly was afterwards. It is also amply clear from her book that she saw her newfound fame as a potential source of profit.

58. QUIGLEY, *supra* note 22, at 21.

59. *Id.*

Accounting for the Slow Growth of American Privacy Law

Rodney A. Smolla*

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I. INTRODUCTION

American privacy law is surprisingly weak.¹ If privacy law were a stock, its performance over the last century would not be deemed impressive.

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1. The phrase "privacy law" is admittedly amorphous, and might be understood to refer to any number of discrete bodies of American law, including the constitutional "right to privacy" reflected in such substantive due process decisions as those protecting personal decisions of issues relating to reproduction and procreation. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing privacy right relating to procreation and use of

It has been a consistently poor achiever, barely keeping up with inflation. I speak here of privacy law in the tort sense, and the four torts that are classically understood to comprise invasion of privacy: 1) false light; 2) publication of private facts; 3) intrusion; and 4) appropriation.² Of these four torts, only appropriation (or “the right of publicity”) has been a ripping success for plaintiffs, a genuine high-return stock, and a species of intellectual property, even though appropriation is arguably not a true form of invasion of privacy at all.³

Samuel Warren and Louis Brandeis are frequently credited for having launched modern privacy law in their article *The Right to Privacy*.⁴ Warren and Brandeis have been critiqued by such estimable scholars as Diane Zimmerman and Harry Kalven, Jr., who have played the requiem for the tort, asking if Warren and Brandeis were wrong.⁵ I come not to bury privacy, however, but to praise it, and lament its stunted growth. The ambition of this article is to try to account for the generally anemic performance of privacy law, and in the process to suggest a number of palliatives that might modestly rejuvenate it.

II. ACCOUNTING FOR THE WEAKNESS OF THE FIRST THREE PRIVACY TORTS

Consider these weaknesses in the first three privacy torts: 1) false light; 2) publication of private facts; and 3) intrusion. First, false light is not much

contraceptives); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming “core” of abortion right recognized in *Roe v. Wade*, 410 U.S. 113 (1973), but modifying that right through imposition of “undue burden” standard). In this article, I use the term exclusively to refer to tort law causes of action that purport to protect privacy.

2. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). This four-part taxonomy of privacy law was originally ordained by the tort oracle William Prosser, who first labored to bring structure to privacy law by creating these four categories.

3. See *infra* notes 150–51 and accompanying text. Throughout this article, I frequently engage in a kind of legal anthropomorphizing—that is, I treat the “law of privacy” or the cause of action for “false light” or the “law of defamation” as if it were human, with ambition for “success.” Of course this is a fiction, and I employ it merely as an economical and vivid narrative device.

4. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

5. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 351 (1983) (citing Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).

more than defamation warmed-over. Second, publication of private facts is a powerful cause of action constantly trumped by a more powerful First Amendment. Lastly, intrusion, while a reasonably strong cause of action for plaintiffs when establishing liability, usually proves paltry when it comes to awarding damages.

A. *False Light*

False light invasion of privacy, which consists of placing someone “in a false light” in the public eye, has always occupied an inherently ambivalent niche in privacy law, primarily because it is so difficult to distinguish the false light tort from good old-fashioned defamation. Many of the elements of false light and defamation overlap.⁶ While defamation requires that the defendant publish a “false statement of fact” about the plaintiff; false light uses a somewhat mushier terminology. However, both causes of action require that a palpable falsehood be published, something capable of proof or disproof, and something more than mere epithet, hyperbole, or opinion.⁷ A plaintiff’s lawyer is naturally drawn to the false light tort when the case involves a “false” portrayal of a client that has an impressionistic character to it—a portrayal in which it is difficult to nail down a hard explicit “false statement of fact” upon which to rest a defamation claim.⁸ Yet the false light tort is not properly understood as a reserve tank for defamation suits that have run out of gas. The requirement of a false statement of fact in defamation law is not merely part of the common law—it is now of

6. RESTATEMENT (SECOND) OF TORTS § 652E (1977). The RESTATEMENT (SECOND) OF TORTS define this tort as follows:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id.

7. RODNEY A. SMOLLA, LAW OF DEFAMATION § 10:10, at 10–15 (2d ed. 2002) [hereinafter SMOLLA I]. See *Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317 (Conn. 1982).

8. This tactic is sometimes successful. See *Moore v. Sun Publ’g Corp.*, 881 P.2d 735 (N.M. Ct. App. 1994) (holding that false light claim could be maintained even though statements at issue were not actionable in defamation because they were opinion). However, for reasons stated in the text above, it is my opinion that viewed objectively, holdings, such as the one in *Moore*, are unsound. *Id.*

constitutional dimension.⁹ A change of terminology ought not result in a change of constitutional principle. In addition, a plaintiff ought not be able to recover for a statement that would be deemed non-actionable in a defamation suit because it is merely opinion, hyperbole, or insult, by merely re-casting the cause of action as false light invasion of privacy. This must be the rule if the First Amendment doctrine requiring a falsehood is to have any genuine meaning.¹⁰

So too, the fault requirements now imposed on defamation law by First Amendment holdings must be understood to apply with *at least* equivalent vigor when the suit is cast as false light.¹¹ Again, this is a forced move, for if we do not calibrate fault rules for false light invasion of privacy with at least the same rigor that we require for defamation, false light would become a pleading loophole allowing the facile avoidance of constitutional imperatives.

Thus, if the false light tort requires fault and falsehood in the defamation sense, what real good is it? How is it not entirely duplicative of defamation law, and thus superfluous? From a plaintiff's perspective, there are three potential strategic advantages to invoking the false light tort as an alternative or add-on to a defamation claim. Admittedly, these advantages may make the tort marginally more attractive than a defamation claim in some instances, but none of them are enormously impressive.

First, returning to the problem of falsehood, an enterprising plaintiff's lawyer may find the looser terminology of false light more attractive than defamation's stern insistence on a "false statement of fact," even if the

9. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

10. See SMOLLA I, *supra* note 7, at 10–15.

11. The fault rules required for false light are at least as demanding as those applicable to defamation. See *Chic Magazine, Inc. v. Braun*, 469 U.S. 883 (1984); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984); *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285 (D.D.C. 1984); *Cantrell v. Am. Broad. Cos.*, 529 F. Supp. 746 (N.D. Ill. 1981) [hereinafter *Cantrell I*]; *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W. Va. 1983). See also, Michael P. Lehmann, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege*, 3 HASTINGS CONST. L.Q. 543, 593 (1976); Jerry J. Phillips, *Defamation, Invasion of Privacy and the Constitutional Standard of Care*, 16 SANTA CLARA L. REV. 77, 99 (1975). There is also substantial authority for the proposition that fault rules for false light claims exceed those for defamation, in that all false light claims must be supported by proof of actual malice, whether or not the plaintiff is a public figure or public official. See *Little Rock Newspapers, Inc. v. Dodrill*, 444 U.S. 1076 (1980); *Dodrill v. Ark. Democrat Co.*, 590 S.W.2d 840 (Ark. 1979); *Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317 (Conn. 1982); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981).

formal doctrine for the two torts, and the jury instructions, are identical. It just *feels* smoother to say that the defendant has placed my client in a “false light in the public eye” than to say that the defendant has made “false factual statements” about my client. Many modern defamation cases are grounded not in the literal falsehood of some publication or broadcast, but in what is implied, or communicated “between the lines.” This is a vexing and difficult problem that constantly appears in defamation cases, and plaintiffs frequently fight desperately to attempt to convince a court to allow a case to go to a jury based on alleged innuendo and implication.¹² This whole battle simply has a more inviting patina when the language is “false light.” At best, however, this is but a small tactical advantage in some cases, more a matter of nuance and atmosphere rather than real substance.

A second possible advantage to the false light tort is that the damages available to a plaintiff are not tied to loss of reputation, the traditional lodestar of defamation law, but rather to the internal emotional and mental

12. Commonly, defamatory statements are communicated not in the literal language that is spoken or written, but implied or insinuated. When this happens, the legal question is whether a suit may be maintained on the basis of what has been implied. The issues surrounding defamation through implication have, for several years, been among the most hotly contested in defamation litigation across the United States. Some jurisdictions have shown substantial hostility to defamation by implication, while others have treated it as a natural and legitimate way in which to construe what is actually communicated by a statement, and are quite permissive in allowing plaintiffs to base cases on what statements imply. The issue of defamation through implication is closely linked to another common-law concept, the term “innuendo,” which has both a highly technical meaning referring to common-law pleading rules, and a more general common sense meaning referring to the insinuation or implication carried by a literal statement. *See Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 499 n.7 (3d Cir. 1978),

The term “innuendo” has two possible meanings in the law of defamation, one of which is technical and the other of which is not. The narrow, technical meaning of the term is associated with the common law system of pleading, under which an “innuendo” was an explanation of the defamatory meaning of a communication in light of extrinsic circumstances, the existence of which was averred to in a prefatory statement called an “inducement.” That is not the meaning of the word as employed in this opinion. The second, and here the relevant, meaning of “innuendo” is that which it has in common language, namely, the insinuation or implication which arises from the literal language used in a statement or set of comments.

Id. (internal citation omitted). *See also Dunlap v. Philadelphia Newspapers, Inc.*, 448 A.2d 6, 15 (Pa. Super. Ct. 1982) (holding “[a] publisher is, of course, liable for the *implications* of what he has said or written, not merely the specific, literal statements made.”). The court stated “we are free to adopt, and have concluded that we should adopt, the approach of sister states, and hold that the literal accuracy of separate statements will not render a communication ‘true’ where, as here, the implication of the communication as a whole was false.” *Id.*

harm caused to the plaintiff by being placed in a false light.¹³ Whereas defamation law is classically understood to compensate a plaintiff primarily for a form of “external” injury, to an “asset” we call “reputation,” privacy law is classically understood to look inward, inside the person, making the plaintiff whole for damage to the soul.¹⁴

Again, however, there is less here than meets the eye. Despite the traditional understanding that defamation cases primarily exist to compensate for external reputational injury, both the formal doctrines and the real world practices in fact are quite porous and permissive in allowing defamation plaintiffs to recover for what are largely internal emotional injuries. Take first, the magnanimous First Amendment definition of “actual harm,” established in *Gertz v. Robert Welch, Inc.*¹⁵ Take second, the holding in *Time, Inc. v. Firestone*,¹⁶ that there is *no* constitutional requirement that reputation injury be *an element* of a claim for defamation; a holding that effectively renders the First Amendment irrelevant on the “external” versus “internal” damages question.¹⁷ Take third, that in practice, we have always dealt largely in euphemism when proving the monetary harm that flows from an injured reputation. “Special damages,” a term-of-art in defamation law, is construed extremely narrowly, requiring evidence of actual pecuniary loss in certain specialized circumstances.¹⁸ The general practice in defamation cases as to how a plaintiff establishes his or her “general damages” for injury to reputation is that a plaintiff introduces evidence that his or her reputation has been tarnished, and the jury is then left to deduce a sum of money that will fairly compensate the plaintiff.¹⁹ In short, the damages question is more

13. *Themo v. New England Newspaper Publ'g Co.*, 27 N.E.2d 753, 755 (Mass. 1940).

14. *See id.* (holding “[t]he fundamental difference between a right to privacy and a right to freedom from defamation is that the former directly concerns one’s own peace of mind, while the latter concerns primarily one’s reputation. . . .”)

15. 418 U.S. 323, 350 (1974) (stating “the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.”).

16. 424 U.S. 448 (1976) [hereinafter *Time I*].

17. *Id.* at 460 (noting that “Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff’s reputation,” and holding that under the Constitution, states are free to predicate defamation awards entirely on internal anguish or humiliation).

18. *See, e.g., Tacket v. Delco Remy*, 959 F.2d 650 (7th Cir. 1992), *rev’d on the other grounds by Tacket v. GMC, Delco Remy Div.*, 93 F.3d 332 (7th Cir. 1996).

19. This is not to say that an experienced plaintiff’s lawyer will not rely on much more than such self-serving evidence from family or friends. John Walsh, one of the nation’s

an academic point than a real one, and does nothing to particularly distinguish false light.

The most important doctrinal difference between false light and defamation is that the falsehood in false light need not be the kind of falsehood that necessarily damages a plaintiff's reputation. This is related to the damages issue, but different from it, in that it goes to the substance of what is said about the plaintiff. In theory, a plaintiff may recover in a false light case even when the false things said about the plaintiff make the plaintiff look *good*, if the falsehood would nonetheless be highly offensive to a reasonable person.²⁰ This, of course, corresponds to the orthodoxy that the gravamen of the false light action is "internal" damage to the plaintiff rather than "external" injury to the plaintiff's standing in the community.²¹ A plaintiff may thus be deeply offended and anguished by a falsehood that to others, particularly those who do not know the plaintiff personally, seems either positive or at worst, neutral. To the extent that this is the only genuine "value-added" by the false light tort, however, it is not much, simply because there does not appear to be that many cases with which what is said about a plaintiff is positive or neutral in terms of reputation, and is still highly offensive. It can happen, but it does not happen often.²²

Indeed, it does not seem that this kind of recovery for a portrayal that is "offensive" but not reputation-injuring is truly an "invasion of privacy" in the ordinary sense of that term. It is more a form of infliction of emotional

premier plaintiff's lawyers, thus cautions against use of such informal anecdotal evidence. See SMOLLA I, *supra* note 7, at 9–17.

20. Two false light cases that have reached the United States Supreme Court seem to fit this paradigm. In *Time, Inc. v. Hill*, the Hill family had been held hostage for nineteen hours by three escaped convicts. 385 U.S. 374, 378 (1967) [hereinafter *Time, II*]. The abductors treated the Hills civilly. *Id.* A novel was written about the event, followed by a Broadway play. *Id.* *Life* magazine did a pictorial article on the play, which it said was inspired by the Hill family episode. *Id.* The article and the accompanying pictures (from the play) portrayed the convicts as violent and abusive toward the Hills and the Hills as bravely facing up to them. *Id.* at 374. There were fictionalizations and errors in the play, but it was not a particularly negative portrayal of the Hills. *Time, II*, 385 U.S. at 374. In *Cantrell v. Forest City Publ'g Co.*, the plaintiff's husband had been killed in a bridge collapse disaster. 419 U.S. 245, 247 (1974) [hereinafter *Cantrell II*]. A newspaper reporter had visited her home, but had not actually seen her. *Id.* at 248. The reporter painted her as proudly and stoically bearing her grief in the face of abject poverty. *Id.* By manufacturing the emotions and conditions of her life the story placed her in a false light. *Id.* at 245.

21. See *supra* notes 13–16 and accompanying text.

22. Some courts have rejected the false light cause of action entirely, finding no cogent policy reasons for adding a tort to the books that appears so largely to overlap defamation. See *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405 (N.C. 1984).

distress.²³ False light does not involve an “invasive” action by a defendant, nor does it reveal information or activity that our society commonly regards as intimate, confidential, or personal. Instead, it is a tort that provides a remedy for the anger, resentment, and outrage that a plaintiff may experience for having been lied about, or “portrayed falsely;” whether the falsehood lowered the esteem in which the plaintiff was held in the eyes of others. Conceptually, the false light tort is a little more than a suit for infliction of emotional distress plus the element of falsity. Seen this way, false light is simply too close to the torts of defamation and infliction of emotional distress to ever amount to much, and does very little to advance any strong social interests in the protection of our core concepts of privacy. William Prosser once expressed the fear that the false light tort was “capable of swallowing up and engulfing the whole law of public defamation.”²⁴ In effect, the reverse has occurred; false light has not done the swallowing, but has itself been devoured.

B. *Publication of Private Facts*

In contrast to false light, the tort of publication of private facts is in some respects the quintessential cause of action for invasion of privacy. This tort truly deals with the core. Here the weakness comes not from the tort itself, which is strong, but from the defenses that are arrayed against it, which are stronger. The tort is classically designed to give a plaintiff a cause of action for the public revelation of some fact about the plaintiff that, in the eyes of the community, is simply nobody else’s business.²⁵

One might think that this tort would be a virtual gold mine for a plaintiff and his or her lawyer, since a large part of our modern media seems to exist primarily for the purpose of revealing private facts about people. Yet, it is not so. The cases in which plaintiffs have succeeded with this tort are not legion, but rare, and there are many notorious examples of courts refusing to allow recovery for the revelation of facts that most reasonable people would regard as private.

For plaintiffs there are two main barriers. First, one of the elements of the tort is that the facts disclosed must be “private” and not “public.”²⁶ There

23. See *infra* notes 49–51 and accompanying text.

24. Prosser, *supra* note 2, at 401.

25. See *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Ct. App. 1983) (sustaining award of \$250,000 for newspaper story revealing that the plaintiff, a female college student body president, was a transsexual).

26. See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

can be a circularity here. In any publication of private facts scenario, virtually by definition some ostensibly private fact has leaked into the general culture. This usually means that someone other than the plaintiff already knew about it. If enough other people already knew about the putatively “private” fact, a court may treat the fact as no longer private but public, and the cause of action is cut off at the knees. Perhaps the best example of this is the case of Oliver Sipple, the off-duty police officer, “who was in the crowd at Union Square, San Francisco” the day that “Sara Jane Moore [tried] to assassinate President Gerald R. Ford” with a pistol.²⁷ Sipple spotted Moore drawing her gun, and heroically grabbed her arm, probably causing her to miss, and probably saving the President.²⁸ In the media coverage about Sipple’s valiant act that followed, it was revealed that he was gay.²⁹ Sipple lost his invasion of privacy suit, and one of the grounds invoked by the appellate court was that too many people already knew Sipple was gay.³⁰ His modest visibility and activism in the gay community was deemed sufficiently public to render his sexual orientation a fact about him that could no longer be characterized as “private.”³¹

More formidably, however, the tort of public disclosure of private facts is frustrated by the “newsworthiness” defense; a defense usually deemed to be both incorporated in common-law doctrine and mandated by the First Amendment,³² and a defense that tends to present plaintiffs with colossal difficulties.³³ We seem to live in an increasingly tabloid culture, and much of what is revealed in modern media about the private lives of people is offensive to many in the community; offending our collective sense of

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Id.

27. Sipple v. Chronicle Publ’g Co., 201 Cal. Rptr. 665, 666 (Ct. App. 1984).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. See *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

33. See Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 148 (1997). “But the general case is that many courts provide media with the extraordinarily broad newsworthiness defense, leaving the public disclosure tort effectively impotent.” *Id.*

decency.³⁴ But this does not mean the revelation is not newsworthy.³⁵ Thus, one constantly encounters causes of action for publication of private facts that might otherwise be deemed worthy ingloriously vanquished by the newsworthiness defense.³⁶

It is intriguing to speculate on what drives the strength of the “newsworthiness” defense, and the concomitant weakness of the publication of private facts tort. Privacy law has suffered from a peculiarly frustrating experience with the “newsworthiness” concept. The frustration is especially fascinating when compared to the very different history of defamation law, which also has a “newsworthiness” doctrine of sorts, though it goes by a different name.³⁷ Defamation law has been strikingly successful in developing its version of the “newsworthiness” doctrine, evolving relatively objective and workable doctrinal contours through a rich body of case law. Why has privacy law failed where defamation law has not? Why is it that in defamation law, courts appear perfectly comfortable evolving standards for defining such factors as what is or is not a “public controversy” and the role the plaintiff has or has not played in the controversy, while courts appear very reluctant to engage in a similar second-guessing of journalistic judgment in privacy cases? Why is the “newsworthiness” pill easier for courts to swallow in defamation cases than in privacy cases—that is, why are courts willing to embark on “objective” definitions of “newsworthiness” that may often second-guess journalistic judgment when it comes to defamation, but not when it comes to privacy?

In defamation law, the “newsworthiness” notion is tied to fault and falsity. In privacy law, it is not. These distinctions have made all the difference. In defamation, the question of whether the case involves “public” or “private” matters enters formal legal doctrine in at least three

34. See Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185 (1979).

35. See *Neff v. Time, Inc.*, 406 F. Supp. 858, 861 (W.D. Pa. 1976) (stating that “[a] factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities.”).

36. See, e.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir. 1989); *Gilbert v. Med. Econs. Co.*, 665 F.2d 305 (10th Cir. 1981); *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980); *Pasadena Star-News v. Superior Court*, 249 Cal. Rptr. 729 (Ct. App. 1988); *Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 655 (Ct. App. 1984); *McNutt v. N. M. State Tribune Co.*, 538 P.2d 804 (N.M. Ct. App. 1975); *Freihofer v. Hearst Corp.*, 480 N.E.2d 349 (N.Y. 1985); *Anderson v. Fisher Broad. Cos.*, 712 P.2d 803 (Or. 1986).

37. See *infra* notes 149–51 and accompanying text.

different places. At the threshold, defamation law generally requires that the allegedly defamatory speech be on issues of “public concern” to qualify for the speaker any heightened First Amendment protection at all.³⁸ Defamation law then divides between public plaintiffs and private plaintiffs, requiring that the “actual malice” standard of knowing or reckless falsity be satisfied for public official and public figure plaintiffs, but permitting private plaintiffs to recover on the lesser showing of mere negligence.³⁹ In turn, there are two types of public figures, the all-purpose public figure, deemed so famous that he or she is treated as public for all purposes; and the far more common “limited public figure,” treated as “public” only for purposes of speech germane to that plaintiff’s participation in a “public controversy.”⁴⁰ There is a substantial body of case law defining the term “public

38. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In *Dun & Bradstreet*, the credit reporting agency, Dun & Bradstreet, issued an inaccurate credit report about the plaintiff, Greenmoss Builders, a residential and commercial building contractor. *Id.* at 751. The Supreme Court, in a plurality opinion by Justice Powell, held that the First Amendment damages rules applicable to defamation actions involving issues of public concern did not apply when the defamation arose in the context of speech not on issues of public concern. *Id.* at 762.

39. *Id.* at 766. Fault standards in modern defamation law are largely dictated by First Amendment doctrines emanating from the Supreme Court’s landmark 1964 decision, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) [hereinafter *New York Times I*]. In the *New York Times I*, the Court held that in defamation actions brought by public officials for defamatory speech germane to the official’s performance in or fitness for office, the public official plaintiff must demonstrate that the defendant published the defamation with “actual malice,” defined as knowledge of falsity or reckless disregard for truth or falsity. *Id.* at 279–80. In a series of decisions following *New York Times I* decision the constitutional rules evolved to include “public figures” as among the plaintiffs who must demonstrate actual malice. The capstone of this evolution came in the 1974 decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The case involved a libel action brought by Elmer Gertz, a well-known Chicago attorney and law professor, against Robert Welch, Inc., the publisher of the monthly magazine, *American Opinion*, an organizer of the John Birch Society. *Id.* at 325. The defendant claimed that Gertz was a public figure and that the magazine was thus entitled to the protection of the *New York Times* actual malice standard. *Id.* The Supreme Court disagreed, holding that Gertz was a private figure, and further holding that in private figure cases, the actual malice standard was not required by the First Amendment. *Id.* The Court in *Gertz* left it to state courts to develop for themselves the proper standard of liability in suits brought by private plaintiffs, so long as they did not dip below the floor requirement of negligence. *Id.*

40. *Gertz*, 418 U.S. at 345.

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those

controversy,” and a substantial body of case law defining the relationship a plaintiff must have to such a “public controversy” in order to be deemed a “limited public figure” in a defamation suit.⁴¹ There are, of course, many close cases, many fact patterns on the cusp, in which deciding whether there is a “public controversy” at stake, or whether the plaintiff may be fairly said to have voluntarily entered that controversy, is an extremely close call.⁴² But a close call is not the same as bad law. The fact that there may be frequent cases close to a line does not mean that the existence of the line is illegitimate. While I do not agree with every decision by the courts, I do believe time has proven that the basic legal standards which have evolved are coherent and functional.

A fundamental axiom of modern defamation law is that the media cannot “bootstrap” itself into the higher level of First Amendment protection granted in public figure cases by *itself* turning the plaintiff into a public figure by focusing attention on the plaintiff.⁴³ The plaintiff must *already* be

classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

Id.

41. See generally SMOLLA I, *supra* note 7, at §§ 2:15–2:77.

42. This sometimes seems exasperating. See *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976) (stating that the demarcation between public and private figures “is much like trying to nail a jellyfish to the wall.”).

43. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 162–64 (1979). In *Wolston*, the Supreme Court held that the plaintiff, Wolston, who had been brought before a grand jury investigation in connection with an espionage inquiry, was a private figure. *Id.* at 161. Wolston ignored a subpoena requiring him to appear before a grand jury in 1958, and subsequently pled guilty to a charge of criminal contempt. *Id.* at 162–63. Wolston's episode with the grand jury investigation and his subsequent conviction for criminal contempt resulted in fifteen newspaper articles in New York and Washington, D.C. *Id.* at 163. Emphasizing that Wolston had not invited controversy by entering into the public arena to influence a public debate, the Supreme Court held Wolston to be a private figure. *Id.*; see also *Outlet Co. v. Int'l Sec. Group, Inc.*, 693 S.W.2d 621, 626 (Tex. App. 1985) (stating “[n]or can we agree with the broadcaster's contention that Medlin was shown to be a public figure. There is no evidence that he assumed any role of special prominence in society. . . .”) Similarly, in *Time, Inc. I*, the Supreme Court ruled that Mary Alice Firestone, wife of Russell Firestone, a member of the wealthy Firestone family, was a private figure, despite being embroiled in bitter and highly publicized divorce litigation. 424 U.S. at 453–57. The Court reasoned that she had done nothing to invite public controversy other than to participate in the litigation, which was not enough to bring her within the definition of a public figure. *Id.* at 453–54. Firestone's prominence in what the Court depicted as “the sporting set” did not qualify her as a person of “especial prominence in the affairs of society.” *Id.* at 453, 487. Even though Mrs. Firestone initiated litigation in a public court of law, the Court held that her action was not a purposeful insertion into a matter of public controversy, since “state law compelled her to

a public figure when the allegedly defamatory statement is made, a public figure by virtue of *voluntary* entry into a *pre-existing* public controversy.⁴⁴

This is solid law in defamation cases.⁴⁵ Yet such bootstrapping often appears to happen *as a matter of course* in privacy cases. In a genuine

resort to legal process in order to obtain lawful release from the bonds of matrimony.” *Id.* at 454. Although the Court conceded that some participants in some litigation may be legitimate public figures, either generally or for the limited purpose of press coverage concerning the litigation, the majority would regard Mary Alice Firestone as “drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others.” *Id.* at 457.

44. Thus in *Hutchinson v. Proxmire*, the Supreme Court held that an academic who had received substantial federal grants for research was a private figure for purposes of criticism of those grants by a United States Senator, William Proxmire. 443 U.S. 111, 136 (1979). The plaintiff, Ronald Hutchinson, was the Director of Research at Kalamazoo State Mental Hospital, in Michigan, who had received more than \$500,000 in federal funds for scientific research. *Id.* at 114. Despite his position and the substantial federal funding his work received, he was deemed a private figure by the Supreme Court. *Id.* at 134. The Supreme Court found that Hutchinson was not a public figure, squarely holding that Senator Proxmire could not turn Hutchinson into a public figure by virtue of Proxmire’s own allegations, because that would permit a defendant to create a public figure defense through the defendant’s own conduct. *Id.* at 135–36. Echoing its holding in *Wolston*, the Court again emphasized that Hutchinson did not thrust himself into the public eye “to influence others.” *Id.* at 135.

45. See, e.g., *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136–37 (2d Cir.1984). The Court in *Lerman* adopted a four-part limited public-figure test, requiring defendant to prove plaintiff:

- (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.

Id.; see also, *Fitzgerald v. Penthouse Int’l, Ltd.*, 691 F.2d 666, 668 (4th Cir.1982); *Durham v. Cannan Communications, Inc.*, 645 S.W.2d 845, 850 (Tex. App. 1982). The Court in *Fitzgerald* adopted a five-part limited public figure test, requiring defendant to prove:

- (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in a public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statements; and (5) the plaintiff retained public figure status at the time of the alleged defamation.

Fitzgerald, 691 F.2d at 668.

The U.S. Supreme Court has indicated that we should not consider post-defamation press coverage in determining whether or not an individual is a public figure. We think this logical. To do otherwise would be to permit the press to turn a person into a public figure by publicizing the defamation itself. We, therefore, cannot consider this story in determining whether or not appellant was a public figure.

publication of private facts scenario, the fact that has been revealed about the plaintiff was by definition not previously revealed to the public.⁴⁶ The plaintiff cannot be said to have voluntarily encouraged the fact's release—to the contrary, the plaintiff has by hypothesis guarded against its general disclosure.⁴⁷ Notwithstanding the fact that the plaintiff may not have sought attention, and may not have invited media scrutiny, courts at times appear willing to treat the fact as “newsworthy.” Indeed, the mere fact that the material *has* appeared in a media publication often seems to go a long way, if not all the way, in establishing that the material is newsworthy.⁴⁸

The operative impact of the “newsworthiness” judgment in defamation law (a judgment that goes under the formal doctrinal label of “public figure” status) is more limited than in privacy law. In defamation cases, the decision to characterize the plaintiff as “public” (and the subject of the defamation, in that sense, “newsworthy”) does not mean the plaintiff loses the case; it merely means the defendant is saddled with the burden of establishing a higher level of fault.⁴⁹ In privacy cases, in contrast, the judgment is all or nothing. If the material is newsworthy, the plaintiff loses.

If privacy law were to “mature,” if you will, on lines more akin to the structure of defamation law, the newsworthiness judgment in privacy cases might become more nuanced, and its impact on the cause of action less draconian. In defamation law, we routinely draw a distinction between “matters of public interest,” and matters “the public is interested in.” Precisely the same judgment is appropriate in privacy law. That a fact that is

Durham, 645 S.W. 2d at 850, n.* (citation omitted).

46. See *supra* note 25 and accompanying text.

47. Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change: 1890–1990*, 74 CAL. L. REV. 789 (1986); RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 117–50 (1992).

48. *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 670 (Ct. App. 1984). The RESTATEMENT (SECOND) OF TORTS § 652D, comment f states,

[t]here are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become “news.” . . . These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.

§652D cmt.f.

49. *New York Times I*, 376 U.S. at 279–80.

revealed is “true” and that its publication might be “of interest” to the public ought not mean that the fact is truly about a matter of “public interest” or “public concern” in the First Amendment sense.⁵⁰ The publication of private facts tort cannot survive if this is to be the rule.

If the private facts tort is to survive, and certainly if it is to flourish, it may thus be helpful to borrow from defamation concepts. Fault plays a role in defamation. Fault, however, is harder to “plug in” to the privacy tort. The reason is that fault in defamation is always tied to a “defect” in the information—its falsity. Fault in this sense is coherent, as it is in a products liability case. There is something wrong with what the defendant has produced—it is factually incorrect—and we can thus talk intelligently about the defendant’s level of culpability in relation to that error: was it entirely innocent, was it negligence, was it the result of reckless indifference to truth or falsity, or was it knowingly false? These are intelligible gradations on a rational spectrum.

In a privacy case, the information released is not “defective” in the same sense. The information is accurate. The formal definition of the tort tries nonetheless to capture some sense of “fault” in the requirement that liability is predicated on a revelation that would be “highly offensive” to a reasonable person. Fault calibrated in terms of *offensiveness*, however, is inherently in greater tension with central First Amendment principles than fault calibrated in terms of *falsity*. Offensiveness has an inherently subjective quality. In most of First Amendment law, the mere fact that speech is offensive to most people in the community does not justify its abridgment.⁵¹ The one glaring exception is obscenity, in which the

50. See *Barbouti v. Hearst Corp.*, 927 S.W.2d 37, 48 (Tex. App. 1996).

A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. . . . [E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention.

Einhorn v. LaChance, 823 S.W.2d 405, 411–12 (Tex. App. 1992).

51. The central principle animating the First Amendment is that the government may not censor speech on the basis of viewpoint. *Texas v. Johnson*, 491 U.S. 397, 406 (1989). Even expression as offensive and disturbing to most citizens as the burning of the American flag is protected under the Constitution. *Id.* at 414. The Court stated, “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Id.*; see *United States v. Eichman*, 496 U.S. 310 (1990) (same). The same principle applies to such reprehensible expression as hate speech. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down the conviction for cross-burning under the hate speech law); *Black v. Commonwealth*, 553 S.E.2d 738 (Va. 2001) (striking down the conviction of Ku Klux Klan leader under the state anti-cross-burning law).

requirement that the material be “patently offensive” to local community standards is an element of the current First Amendment standard.⁵² Indeed, it was the fact that the emotional distress tort was tied to such subjective notions of “offensiveness” that led the Supreme Court in the *Hustler* case to strike down its application in Jerry Falwell’s claim against Larry Flynt and *Hustler Magazine*.⁵³

There are numerous legal and cultural forces at work here. First, there is the ingrained skepticism in our constitutional tradition for permitting the imposition of any civil or criminal liability for the mere publication of *truthful* facts that are lawfully obtained.⁵⁴ Second, there is a reflexive wariness in our constitutional tradition of any regime that permits government actors to second-guess the editorial judgment of journalists or other speakers as to what is or is not worthy of being said.⁵⁵ Third, there is strong *cultural* ambivalence about the revelation of private facts, and ambivalence that works very powerfully to differentiate the private facts tort from the

52. See *Miller v. California*, 413 U.S. 15 (1973).

53. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988); see also Paul A. LeBel, *Emotional Distress, the First Amendment, and "This Kind of Speech": A Heretical Perspective on Hustler Magazine v. Falwell*, 60 U. COLO. L. REV. 315 (1989); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990); RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* (Illini Books ed., 1990) (1988) [hereinafter SMOLLA II].

54. See, e.g., *Butterworth v. Smith*, 494 U.S. 624 (1990) (refusing to enforce the traditional veil of secrecy surrounding grand jury proceedings against a reporter who wished to disclose the substance of his own testimony after the grand jury had terminated, holding the restriction inconsistent with the First Amendment principle protecting disclosure of truthful information); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding unconstitutional the imposition of liability against a newspaper for publishing the name of a rape victim in contravention of a Florida statute prohibiting such publication in circumstances in which a police department inadvertently released the victim’s name); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 104 (1979) (finding unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender, where the newspapers obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor, stating that “[t]he magnitude of the State’s interest in this statute is not sufficient to justify application of a criminal penalty. . . .”); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (overturning criminal sanctions against newspaper for publishing information from confidential judicial disciplinary proceedings leaked to the paper); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (holding unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim obtained from the courthouse records).

55. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

defamation tort.⁵⁶ Defamation involves the publication of falsehoods. The private facts tort involves the publication of truths. Everybody dislikes a liar. The opprobrium that attaches to bearing false witness against one's neighbor is of biblical stature, a moral proposition one is taught from childhood.

The social opprobrium that attaches to spreading *true* information about others, even if the information is maligned as "dirt," is far less intense than the social opprobrium that attaches to spreading lies. This is because almost everybody *does* gossip. Some gossip more, some gossip less, but only a few exceptionally saintly or reclusive souls do not gossip at all. Gossip is the junk food of knowledge, a guilty indulgence. Most of us practice it as much as we condemn it. Indeed, trafficking in gossip is considered gainful employment that may be honorably pursued as a profession. Most newspapers publish gossip columnists. There are no newspapers that, to my knowledge, publish libel columnists.

These factors have conspired to severely stunt the growth of the publication of private facts tort. The Supreme Court's latest foray into privacy, in *Bartnicki v. Vopper*,⁵⁷ is a prime example. While *Bartnicki* dealt with the revelation of conversations obtained by eavesdropping on a cellular phone conversation in violation of electronic eavesdropping statutes,⁵⁸ the case applies well to common law invasion of privacy suits. The Court, in *Bartnicki*, ruled that various state and federal laws making it illegal to disclose material acquired through the illegal interception of cellular phone messages are unconstitutional; at least when those laws are applied against defendants who do not themselves engage in the acts of interception, who receive the material from anonymous sources, *and* when the subject-matter of the intercepted conversations are deemed to be "matter[s] of public concern."⁵⁹

The case involved a statute passed by Congress in 1968, Title III of the Omnibus Crime Control and Safe Streets Act of 1968.⁶⁰ The statute made illegal not only the interception of electronic communications, but also subsequent disclosure or use of the contents of the communication by any

56. See Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort* 77 CAL. L. REV. 957, 1007 (1989) (observing that the newsworthiness test "bears an enormous social pressure, and it is not surprising to find that the common law is deeply confused and ambivalent about its application").

57. 532 U.S. 514, 514 (2001).

58. *Id.*

59. *Id.* at 535.

60. 18 U.S.C. § 2510 *et seq.*

person knowing or having reason to know that the communication was obtained illegally.⁶¹ The law also created a civil action, essentially a statutory tort claim, against any person who intentionally violated the Act.⁶² More than forty states,⁶³ including Pennsylvania⁶⁴ (where *Bartnicki* arose),

61. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, provides in pertinent part that it is a violation of law when any person:

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.

Id.

62. 18 U.S.C. § 2520(a). In such a suit the plaintiff may obtain equitable or declaratory relief, damages (calculated as the greater of actual damages or specified statutory damages), punitive damages, and attorney's fees and costs. 18 U.S.C. §§ 2520(b), (c).

63. Depending on exactly what statutes one counts, as many as forty-four states prohibited interception and disclosure of electronic communications in some circumstances, in statutory provisions that were often patterned closely after Title III. *See, e.g.*, ALA. CODE §§ 13A-11-31, -35 (1994); ALASKA STAT. §§ 42.20.300-330 (Michie 2000); ARIZ. REV. STAT. §§13-3005, -3006(2001); CAL. PENAL CODE §§ 631, 632 (West 1999); COLO. REV. STAT. §18-9-303 (2001); CONN. GEN. STAT. ANN. §§ 53a-187, -188, -189, 54-41r (West 2001); DEL. CODE ANN. tit. 11, § 1336 (1995); GA. CODE ANN. §§ 16-11-62, -66.1 (1999); HAW. REV. STAT. § 803-42 (1993); IDAHO CODE § 18-6702 (Michie 1997 & Supp. 2001); 720 ILL. COMP. STAT. 5/14-2 (1993 & Supp. 2001); IND. CODE ANN. § 35-45-2-4 (Michie 1998); IOWA CODE §§ 808B.2, .8 (1994); KAN. STAT. ANN. § 21-4002 (1995); KY. REV. STAT. ANN. §§ 526.020, .060 (Michie 1998); LA. REV. STAT. ANN. §§ 15:1303, :1312 (West 1992 & Supp. 2002); ME. REV. STAT. ANN. tit. 15, §§ 710, 711 (West 1964 & Supp. 2001); MD. CODE ANN. CTS. & JUD. PROC. § 10-402 (1998); MASS. GEN. LAWS ANN. ch. 272, § 99(c) (West 1990); MICH. COMP. LAWS ANN. §§ 750.539c, .539e, .539h (West 1991 & Supp. 1995); MINN. STAT. ANN. §§ 626A.02, .13 (West 1998); MO. REV. STAT. §§ 542.402, .418 (1996); MONT. CODE ANN. § 45-8-10 (1997); NEB. REV. STAT. §§ 86-702, -707.02 (1995); NEV. REV. STAT. 200.620, .630, .650, .690 (1994); N.H. REV. STAT. ANN. § 570-A:2 (1995); N.J. STAT. ANN. §§ 2A-156A-3, -24 (West 1985 & Supp.2002); N.M. STAT. ANN. §§ 30-12-11, -14 (Michie 1994); N.Y. PENAL LAW §§ 250.05, .25 (McKinney 1999); N.C. GEN. STAT. § 15A-287 (2002); N.D. CENT. CODE § 12.1-15-02 (1997); OHIO REV. CODE ANN. §§ 2933.52, .65 (Anderson 1999); OKLA. STAT. ANN. tit. 13, §§ 176.2-176.5 (West 2002); OR. REV. STAT. §§ 165.540, .543 (2001); 18 PA. CONS. STAT. ANN. §§ 5703, 5725 (West 2000); R.I. GEN. LAWS § 11-35-21 (2000); TENN. CODE ANN. §§ 39-13-601-603 (1997); TEX. PENAL CODE ANN. §§ 16.02, .05 (Vernon 1994); UTAH CODE ANN. §§ 77-23a-4, -11 (1999); VA. CODE ANN. §§ 19.2-62, -69 (Michie 2000); W. VA. CODE §§ 62-1D-3, -12 (2000); WIS. STAT. ANN. § 968.31 (West 1998); WYO. STAT. ANN. §§ 7-3-602, -609 (Michie 2001). *See also* ARK. CODE ANN. § 5-60-120(a) (Michie

had laws on the books similar to the federal provision. The dispute in *Bartnicki* arose from an intercepted conversation between two persons actively involved in a labor dispute, Gloria Bartnicki and Anthony Kane.⁶⁵ Gloria Bartnicki was a principal labor negotiator for a teachers' union in Pennsylvania, the Pennsylvania State Education Association.⁶⁶ Anthony Kane, a high school teacher at Wyoming Valley West High School, was president of the union.⁶⁷ In May of 1993, Bartnicki and Kane had a telephone conversation concerning the ongoing labor negotiations with a local school board.⁶⁸ Kane was speaking from a land phone at his house.⁶⁹ Bartnicki was talking from her car, using her cellular phone.⁷⁰ Strategies and tactics were discussed, including the possibility of a teacher strike.⁷¹ The talk was candid, and included some blunt, characterizations of their opponents in the labor controversy, at times getting personal.⁷² One of the school district's representatives was described as "too nice," another as a "nitwit," and still others as "rabble rousers."⁷³ Among the opposition tactics that raised the ire of Bartnicki and Kane was the proclivity, in their view, of the school district to negotiate through the newspaper, attempting to pressure the teachers' union by leaks to the press.⁷⁴ The papers had reported that the school district was not going to agree to anything more than a pay raise of

1997) (while not directly prohibiting subsequent disclosure, the statute does make it a crime to "record or possess a recording of such communication"); D.C. CODE ANN. §§ 23-542, -554 (2001).

64. See Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 PA. CONS. STAT. ANN. § 5703 (West 2000) *et seq.* (making it a felony when any person "intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication" or "intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.").

65. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

66. *Id.* at 518.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Bartnicki*, 532 U.S. at 518.

71. *Id.*

72. *Id.*

73. *Bartnicki v. Vopper*, Brief of Petitioner, 2000 WL 1280378 at *4.

74. *Bartnicki v. Vopper*, 532 U.S. 514, 518-19 (2001).

three percent.⁷⁵ As they discussed this position, Kane stated: "If they're not gonna move for three percent, we're gonna have to go to their homes . . . [t]o blow off their front porches, we'll have to do some work on some of those guys."⁷⁶

The direct wrongdoer—the actual "intruder," so to speak—is not known, or at least was not identified in the record.⁷⁷ This anonymous person intercepted the conversation, presumably using a scanner that picked up the cellular phone transmissions, recording it on a cassette tape.⁷⁸ An unknown person (who may or may not have been the interceptor) then proceeded to place the tape in the mailbox of the president of a local taxpayer's group that was opposed to the teachers' union and its bargaining positions, a man named Jack Yocum.⁷⁹ Yocum listened to the tape, recognized the voices of Bartnicki and Kane, and took the tape to a local radio station talk show host, Frederick Vopper.⁸⁰ Vopper received the tape in the Spring of 1993, but waited until late September to broadcast it, which he did a number of times.⁸¹ At first Vopper broadcast a part of the tape that revealed Bartnicki's phone numbers.⁸² Other media outlets also received copies of the tape, including a newspaper in Wilkes-Barre, but no other broadcaster or publisher played the tape or disclosed its contents until Vopper initially broadcast the material on the tape.⁸³ Once Vopper broke the story, however, secondary coverage of the events, including the contents of the tape, appeared in other media outlets.⁸⁴ Invoking a federal statute and a very similar Pennsylvania law, Bartnicki and Kane sued Yocum, Vopper, and the radio stations that carried Vopper's show, for having used and disclosed the tape of their intercepted telephone conversation.⁸⁵

In an opinion written by Justice Stevens, the United States Supreme Court ruled that the prohibitions against intentional disclosure of illegally intercepted communication, which the disclosing party knows or should know was illegally obtained, were "content-neutral law[s] of general

75. *Id.*

76. *Id.*

77. *Id.* at 514.

78. *Id.* at 519.

79. *Bartnicki*, 532 U.S. at 519.

80. *Id.* The host of the show was named Frederick Vopper, though he appeared on the air under the name "Fred Williams."

81. *Id.*

82. *Bartnicki v. Vopper*, Brief of Petitioner, 2000 WL 1280378 at *4.

83. *Id.* at *4–5.

84. *Bartnicki v. Vopper*, 532 U.S. 514, 514 (2001).

85. *Id.* at 520.

applicability.”⁸⁶ The court added that application of those provisions against the defendants violated their free speech rights, since the taped conversations concerned matters that the Court deemed to be of public importance.⁸⁷ Critical to the Court’s ruling was its assumption that the defendants had not played a part in the illegal interception.⁸⁸ The Court in *Bartnicki* emphasized that it was *not* answering the ultimate question of whether the media may *ever* be held liable for publishing truthful information lawfully obtained, but was rather addressing what it described as “a narrower version of that still-open question,”⁸⁹ which it put as: “Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?”⁹⁰ The purpose of the law, the Court explained, was to protect the privacy of wire, electronic, and oral communications, and it singles out such communications by identification of the fact that they were illegally intercepted by virtue of the source, rather than the subject matter.⁹¹ On the other hand, the Court held, the prohibition against disclosures was still fairly characterized as a regulation of speech.⁹² The Court held that the first interest identified by the Government in support of the law—removing an incentive for parties to intercept private conversations—could not justify the

86. *Id.* at 526.

87. *Id.* at 534.

88. *Id.* at 530.

89. *Bartnicki*, 532 U.S. at 528.

90. *Id.* (quoting *Boehner v. McDermott*, 191 F.3d 463, 484–85 (D.C. Cir. 1999) (Sentelle, J., dissenting) *rev’d by* *McDermott v. Boeher*, 532 U.S. 1050 (2001)). The Court observed that it’s unwillingness to construe the question before it any more broadly was consistent with the “Court’s repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.” *Id.* at 529.

91. *Id.* at 526.

92. *Id.*

On the other hand, the naked prohibition against disclosures is fairly characterized as a regulation of pure speech. Unlike the prohibition against the “use” of the contents of an illegal interception in § 2511(1)(d), subsection (c) is not a regulation of conduct. It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of “speech” that the First Amendment protects. As the majority below put it, [i]f the acts of “disclosing” and “publishing” information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.

Bartnicki v. Vopper, 532 U.S. 514, 526–27 (2001) (internal citations omitted).

statute.⁹³ The normal method of deterring unlawful conduct, the Court argued, is to punish the person engaging in it, and it would be remarkable, the Court claimed, to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.⁹⁴ The Government's second interest—minimizing the harm to persons whose conversations have been illegally intercepted—was in the view of the Court considerably stronger.⁹⁵ Privacy of communication, the Court accepted, is an important interest.⁹⁶ Nevertheless, the Court reasoned, because the statements made by Bartnicki and Kane would have been matters of “public concern” had they been made in a public arena, they were also matters of public concern when made in private conversation.⁹⁷ Invoking the long line of precedents granting the media a First Amendment right to print truthful information on matters of public concern that is “obtained lawfully,”⁹⁸ the Court held that the newsworthiness of the information revealed trumped the privacy rights of the parties to the conversation.⁹⁹

The decision in *Bartnicki* was crucially influenced by the judgment that the purloined conversations were, in effect, “newsworthy,” because they were on matters of public concern.¹⁰⁰ This was an extremely generous understanding of speech of “public concern” from the defendants’ perspective, and seemed heavily influenced by the roughness of the

93. *Id.* at 529.

94. *Id.* at 530.

The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of § 2511(1)(a) do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.

Id. at 529–30.

95. *Id.* at 532.

96. *Bartnicki*, 532 U.S. at 532 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985)).

97. *Id.* at 525.

98. *Id.*; see, e.g., *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102, (1979) (stating that “state action to punish the publication of truthful information seldom can satisfy constitutional standards”); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*).

99. *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001).

100. *Id.*

conversation, and its ostensible reference to criminal violence.¹⁰¹ This influence was most visible in the concurring opinions of Justice Breyer and Justice O'Connor.¹⁰² Justices Breyer and O'Connor came down hard on the fact that the conversation between Bartnicki and Kane appeared to contemplate violent and illegal action.¹⁰³ In the views of those two concurring Justices, it was only this added element of illegality that provided the special circumstances that warranted application of a newsworthiness defense to the disclosure of the intercepted conversation.¹⁰⁴ Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented.¹⁰⁵ The laws at issue, he argued, were content neutral because they sought to restrict only the disclosure of information that was illegally obtained in the first instance, placed no restrictions on republication of material already in the public domain, did not single out the media for especially unfavorable treatment, utilized a scienter requirement to avoid being sprung to trap the unwary, and promoted both the privacy interests and the free speech interests of those using devices such as cellular telephones.¹⁰⁶

The *Bartnicki* decision, however, while a major press victory in its outcome, is not an entirely anti-privacy decision. Although on the facts of the case the newsworthiness defense won again, there were signals from a majority of the Justices that it would not win all the time.¹⁰⁷ Given the narrower concurring views of Justices Breyer and O'Connor, a better understanding of *Bartnicki* is to treat the expansive remarks of Justice Stevens, writing for the nominal majority, as really expressing only the views of a four-Justice plurality. The pivotal concurring opinion of Justice Breyer made it clear that he was only applying "intermediate scrutiny" to the statute,¹⁰⁸ and that in a future case, a case not implicating speech that posed

101. *Id.* at 535–36.

102. *Id.* at 536 (Breyer, J. concurring).

103. *Id.* at 539 (Breyer, J. concurring) (stating "the speakers had little or no *legitimate* interest in maintaining the privacy of the particular conversation. That conversation involved a suggestion about 'blow[ing] off . . . front porches' and 'do[ing] some work on some of these guys,' . . . thereby raising a significant concern for the safety of others.").

104. *Bartnicki*, 532 U.S. at 539 (Breyer, J. concurring).

105. *Id.* at 541 (Rehnquist, C.J., dissenting).

106. *Id.* at 548 (Rehnquist, C.J., dissenting).

107. *Id.* at 525.

108. *Id.* at 536 (Breyer, J., concurring).

I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the

the specter of criminal violence, he would be willing to sustain the types of disclosure limits imposed by eavesdropping laws.¹⁰⁹

As discussed in the concluding section of the article,¹¹⁰ *Bartnicki* may provide some valuable clues as to the types of doctrinal developments that might well evolve to generally strengthen privacy torts.

C. *Intrusion*

From a plaintiff's perspective, the tort of intrusion has been more of a success story than false light or publication of private facts, because the tort of intrusion is largely inculcated against any strong First Amendment defense. Intrusion is typically defined as requiring an intentional intrusion into the solitude or seclusion of another that "would be highly offensive to a reasonable person."¹¹¹ The intrusion tort is complete before any material obtained from the intrusion is ever disseminated—indeed, there is no requirement that any material even be gathered or observed from the intrusion, let alone published. In this sense, intrusion appears to involve only "conduct," and not "speech" at all, and thus raises no serious First Amendment issues.¹¹²

This is a somewhat artificial understanding of intrusion, however, because, in fact, most high-profile intrusion cases involve a media defendant who has allegedly intruded in the course of gathering news. On the

extent of these benefits, as well as the need for the restrictions in order to secure those benefits? What this Court has called 'strict scrutiny'—with its strong presumption against constitutionality—is normally out of place where, as here, important competing constitutional interests are implicated.

Id.

109. *Bartnicki*, 532 U.S. at 537–38 (Breyer, J., concurring).

As a general matter, despite the statutes' direct restrictions on speech, the Federal Constitution must tolerate laws of this kind because of the importance of these privacy and speech-related objectives. Rather than broadly forbid this kind of legislative enactment, the Constitution demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with personal, speech-related privacy.

Id. (Breyer, J. concurring) (internal citations omitted); see Warren & Brandeis, *supra* note 4, at 196; RESTATEMENT (SECOND) OF TORTS § 652D (1977); *Katz v. United States*, 389 U.S. 347, 350–51 (1967) (stating "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States").

110. See *infra* notes 153–55 and accompanying text.

111. See RESTATEMENT (SECOND) OF TORTS § 652B (1977).

112. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999).

hypothesis that the First Amendment ought to be understood as providing at least some protection for the newsgathering process *antecedent* to the dissemination of news,¹¹³ there is arguably at least some role for the First Amendment in fashioning the contours of the intrusion tort. The matter can be pressed further. A major function of modern *investigative* journalism is the revelation of corruption and malfeasance. Whether the journalist is trying to uncover wrongdoing by the government, or wrongdoing by individuals or corporations in the private sector, virtually by definition, investigative journalists seek to reveal what others would rather keep secret.¹¹⁴ One strategy for doing this is to be sneaky. Some journalists, like some cops, operate best undercover.¹¹⁵

Thus far the law has mediated these tensions through a series of doctrinal devices, which create the surface impression that the intrusion tort is a valuable legal device for protecting privacy, when in fact it renders the tort relatively ineffectual and a meaningless remedy for privacy invasions. The deceptive surface is the product of a time-honored strain of First Amendment jurisprudence that defiantly and consistently avows that the media is not the beneficiary of any special constitutional exemption from laws of "general applicability."¹¹⁶ This doctrine was applied most famously

113. See Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975).

114. See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998) (stating "[i]nformation collecting techniques that may be highly offensive when done for socially unprotected reasons—for purposes of harassment, blackmail or prurient curiosity, for example—may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story.").

115. There is, of course, a critical moral and legal difference between cops and journalists. Cops act formally on behalf of society, and are subject to the strictures of constitutional limitations on their undercover activity, including the Fourth Amendment's protection from unreasonable search and seizure. In our society we generally reserve the right to use force to enter the private spaces of another for the purposes of policing wrongdoing to—of course—the police. See Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998).

116. See, e.g., *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969) (sustaining application of antitrust laws to the press); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946) (sustaining application of Fair Labor Standards Act to the press); *Associated Press v. United States*, 326 U.S. 1 (1945) [hereinafter *Associated Press I*]; *Associated Press v. NLRB*, 301 U.S. 103 (1937) [hereinafter *Associated Press II*] (sustaining application of National Labor Relations Act to the press); see also *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990) (sustaining generally applicable sales tax even as applied to religious books and merchandise).

in *Cohen v. Cowles Media Co.*,¹¹⁷ in which a newspaper was sued by a source for breaking a promise to keep the source's name confidential, where the newspaper revealed the source because it came to the judgment that the source's name had become newsworthy.¹¹⁸ The newsworthiness defense did not help the defendant in *Cohen*, because the breach of promise was deemed a breach of generally applicable law that occurred independent of any act of publication.¹¹⁹ The Court thus announced that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."¹²⁰ The surface power of this proposition, however, is depleted in many intrusion cases through a combination of other common-law and First Amendment doctrines. Intrusion claims require some invasion of a plaintiff's "solitude" or "seclusion;" concepts that are consistently interpreted to *bar* recovery for investigative efforts that involve surveillance of a plaintiff in a public space, or surveillance of a plaintiff in a non-public space where the plaintiff nonetheless did not have any reasonable expectation of privacy.¹²¹ The mere fact that the defendant has used a hidden camera or secret microphone, for example, will usually not render an act an "intrusion" when the setting is deemed a non-private space.¹²² This has the practical effect of largely limiting actionable "intrusions" to situations in which other torts designed to protect "space" will do the trick just as well, if not better. Many intrusions are just fancy forms of trespass.¹²³

117. 501 U.S. 663 (1991).

118. *Id.* at 665.

119. *Id.* at 671–72.

120. *Id.* at 669; *see also* *Citizen Publ'g*, 394 U.S. at 131 (sustaining application of antitrust laws to the press); *Associated Press I*, 326 U.S. at 1; *Associated Press II*, 301 U.S. at 103 (sustaining application of National Labor Relations Act to the press); *Oklahoma Press Publ'g*, 327 U.S. at 186 (sustaining application of Fair Labor Standards Act to the press).

121. *See* *O'Connor v. Ortega*, 480 U.S. 709, 715–17 (1987) (finding a psychiatrist's office was place at which a psychiatrist had reasonable expectation of privacy); *Frankel v. Warwick Hotel*, 881 F. Supp. 183, 188 (E.D. Pa. 1995) (finding a father's meddling in son's marriage was not an intrusion where there was no "physical or sensory penetration of a person's zone of seclusion"); *Green v. Chicago Tribune Co.*, 675 N.E.2d 249, 255–56 (Ill. App. Ct. 1996); *Barber v. Time, Inc.*, 159 S.W.2d 291, 295 (Mo. 1942) (stating that "[c]ertainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital . . . without personal publicity.").

122. *See* *PETA v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1280–81 (Nev. 1995) (rejecting an intrusion claim by an animal trainer who allegedly engaged in abuse of monkeys in a backstage preparation area).

123. *See* *Simmons v. Miller*, 970 F. Supp. 661, 668 n.2 (S.D. Ind. 1997) (noting an intrusion "typically entails an 'intrusion upon the plaintiff's physical solitude or seclusion'").

Damages rules play an even more significant role. Many courts appear determined to draw a line between the damages that flow from the actual intrusion itself, and the damages that flow from the subsequent publication of the material obtained during the act of intrusion. Damages that come from the dissemination of the material, courts reason, are subject to First Amendment restraints, such as the newsworthiness defense.¹²⁴ If the undercover television news crew captures scenes of unsanitary food preparation practices during a behind-the-scene expose of a restaurant in which a journalist has fraudulently taken a job as a waiter; the restaurant may recover, free of any First Amendment constraint, for the damage caused to it by the employment of the confederate waiter and the waiter's secret filming of the back kitchen. However, the restaurant may *not* recover free of First Amendment restraint for the subsequent broadcast of that video footage. To recover for what was disseminated, the restaurant must invoke the law of defamation (or its privacy cousin, false light) or the privacy tort of publication of private facts. Defamation and false light will not work as causes of action if the material broadcast is substantially true.¹²⁵ While it is not correct that "the camera does not lie"—for we know that sometimes the camera does lie—it is correct that the camera does not lie often. As long as the journalists do not edit the material or otherwise present it in a manner that is false in some material sense, there can be no recovery. As to the publication of private facts tort, if in fact the restaurant was engaged in unhealthy food preparations, this will be deemed newsworthy, and under application of that defense, the plaintiff will again lose.

124. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999).

125. Under First Amendment principles established by the United States Supreme Court, the plaintiffs have the burden of proving that the allegedly defamatory statements made are false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Minor, trivial, technical falsehoods will not support a defamation action. *Masson v. New Yorker Magazine*, 501 U.S. 496, 516–17 (1990). Rather, the test is whether the "gist" or the "sting" of the allegedly defamatory statements was different than publication of the literal truth would have been. *Id.* The defendants are protected from liability for minor or trivial inaccuracies, but may be held liable for statements that deviate in a material way from the truth. *Id.* at 516. The concept is a simple one: a charge is not "substantially true" if the average reader thinks differently of the plaintiff had the actual facts been presented correctly. As the Supreme Court in *Masson* explained: "Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* at 517 (citing ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 138 (1980)); see *Wehling v. Columbia Broad. Sys.*, 721 F.2d 506, 509 (5th Cir. 1983); SMOLLA II, *supra* note 7, at § 5.8.

Once we disqualify all damages from the dissemination of the material, the plaintiff is relegated to those damages that flow in some direct sense from the intrusion itself. These damages are likely to be nominal, if they exist at all.¹²⁶

It must be admitted that occasionally there are successful intrusion claims. These usually involve an intrusion of unusually brazen insensitivity into a scene of grief, violence, or injury in which society is outraged by the distress caused to the victim or the victim's family. The plaintiff in such a case is usually innocent of any wrongdoing, so that whatever newsworthiness inures in the portrayal of the plaintiff, comes from the plaintiff's own misfortune or victimization—as when a television news crew films a patient in a hospital bed or in a rescue helicopter.¹²⁷ There are also some recent statutory elaborations on common-law intrusion, such as California's new electronic trespass laws that modestly revitalize the tort. On balance, however, one would be hard pressed to rate the tort at much higher than a "C" average. This much can clearly be said: when one considered how widespread and common hidden camera style reporting is in modern media, what is most striking about intrusion is how rarely plaintiffs are able to use it to get an "A."

III. WHEN PRIVACY AND PROPERTY CONVERGE

The one privacy tort that truly exceeds market expectations is appropriation, or the right of publicity. This tort, in fact, is living beyond its means. Courts have, with some frequency, applied it in ways that not only stretch the credulities of sound public policy, but also in ways that seem downright unconstitutional. Any number of examples might be cited, but I will describe three holdings that strike me as symptomatic of the tendency of some courts and legislatures, seemingly star struck, to extend lavish protection to the personas of celebrities. The cases involve personalities that, on the face of things, could not be more different: Vanna White, Muhammad Ali, and the comic triumvirate of Larry, Curly, and Moe, known collectively as "The Three Stooges."

Muhammad Ali (then named Cassius Clay), in his prime, was not only the world's greatest heavyweight boxer; he was the world's greatest celebrity. When he left boxing, his celebrity faded, and debilitated by the effects of Parkinson's disease, he largely left the public eye. Ali's fame was

126. *Id.*; see *Veilleux v. National Broad. Co.*, 206 F.3d 92, 128 (1st Cir. 2000).

127. See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998).

rejuvenated when he was chosen to light the Olympic torch at the Centennial Olympic Games in Atlanta. It was also rejuvenated through the portrayal of his life in a well-regarded feature film in which he was played by Will Smith. My children, all of whom were under the age of thirteen in 2002, were not alive when Muhammad Ali defeated Sonny Liston for the heavyweight crown; not alive when Ali changed his name from Cassius Clay to Ali; not alive when he bantered with Howard Cosell once a month on ABC's *Wide World of Sports*; not alive when he refused to report for the draft in Vietnam; not alive when he was stripped of his heavyweight title; and not alive when he regained it. Some of my children had been born by the time Ali lit the Olympic Torch in 1996, though they only vaguely remember that moment. At the time the torch was being lit, they had to ask who Ali was, and why their dad had tears in his eyes, and why Ali had been chosen to light the torch, and why Ali's hand shook so strongly with palsy. But all my children know Will Smith. And because of the movie (whether they saw it or not), they now know Ali. Indeed, more people know Ali, and his legend, than know the name of the current heavyweight champion of the world. There are probably people who still think of Ali as the champion.

In the late 1970s, when Ali was still at the apex of his fame, he sued *Playgirl Magazine*.¹²⁸ Ali's dispute with *Playgirl* arose from a fictional sexual fantasy and an accompanying sketch of a boxer run by the magazine in its February 1978 issue. Ali's name was not used in the piece, nor was any photograph of him taken. Rather, his image was conjured up through fiction and an impressionistic sketch, as part of a sexual fantasy.¹²⁹ The court ruled that Ali should prevail against the magazine for its violation of his right of publicity. The court even imposed the harsh remedy of an injunction against any further distribution of the issue. However, on closer examination of this fight, it looks like Ali may have won it with a phantom punch. The case is an insult in search of a cause of action. While

128. *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

129. *Id.* In the words of the court:

Even a cursory inspection of the picture which is the subject of this action strongly suggests that the facial characteristics of the black male portrayed are those of Muhammad Ali. The cheekbones, broad nose and wideset brown eyes, together with the distinctive smile and close cropped black hair are recognizable as the features of the plaintiff, one of the most widely known athletes of our time. In addition, the figure depicted is seated on a stool in the corner of a boxing ring with both hands taped and outstretched resting on the ropes on either side. Although the picture is captioned "Mystery Man," the identification of the individual as Ali is further implied by an accompanying verse which refers to the figure as "the Greatest[.]"

Id. at 726-27.

undoubtedly the sexual fantasy may have conjured up the image of Muhammad Ali in the minds of readers, what was the nature of the “right” held by Ali that this effort violated? There was no false statement of fact expressed or implied, for no reasonable reader could have understood the fictionalized sexual fantasy as an actual assertion that Ali had engaged in sexual activity with the fantasizer.¹³⁰

To the extent that the “offense” was the emotional distress suffered by Ali for finding himself the object of such a fantasy, the subsequent decision of the United States Supreme Court in *Hustler Magazine, Inc. v. Falwell*,¹³¹ would preclude recovery for that distress alone.¹³² There was no “intrusion” into Ali’s solitude. It was the case, of course, that his *identity* was in a sense appropriated by *Playgirl*. But this appropriation was not an appropriation of Ali’s “privacy” in any normal sense, for nothing he *actually* did was described; nor can it be plausibly maintained that Ali’s “property” in his name or likeness (or more broadly, his “identity”) was appropriated, in the sense that our law ought to recognize appropriation. Ali’s identity, as with virtually all intellectual property, is, in part, owned by the property-owner, and, in part, dedicated to the public domain: this is the place where property, privacy, and public goods converge.

White v. Samsung Electronics America, Inc.,¹³³ the Vanna White case, demonstrates just where the convergence between property, privacy, and publicized goods can lead. In this case, the Samsung electronics company ran an impish and funny commercial featuring a robot dressed in a wig, gown, and jewelry reminiscent of Vanna White’s usual style on the popular game show *Wheel of Fortune*.¹³⁴ The robot was posed in front of a *Wheel of Fortune*-like game board.¹³⁵ White sued and won on a claim for violation of her rights of publicity, as codified in the California statute.¹³⁶ Judge Alex Kozinski dissented from a denial of rehearing *en banc*, in an opinion that was on the money:

130. See, e.g., *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438 (10th Cir. 1982).

131. 485 U.S. 46 (1988). The Court held that “a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’” *Id.* (quoting *New York Times I*, 376 U.S. at 279–80).

132. See *supra* note 48 and accompanying text.

133. 989 F.2d 1512 (9th Cir. 1993).

134. *Id.* at 1514.

135. *Id.*

136. CAL. CIV. CODE § 3344(a) (West 1997).

Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine. Private land, for instance, is far more useful if separated from other private land by public streets, roads and highways. Public parks, utility rights-of-way and sewers reduce the amount of land in private hands, but vastly enhance the value of the property that remains.

So too it is with intellectual property. Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.¹³⁷

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,¹³⁸ for example, the Supreme Court of California applied California's statutory right of publicity to prevent exploitation of The Three Stooges comedy act, even though Moe Howard, Curly Howard, and Larry Fein, the stooges, were all dead.¹³⁹ The California statute defines "deceased personality" as a person

137. *White*, 989 F.2d at 1513.

138. 21 P.3d 797 (Cal. 2001).

139. The right of publicity in California is both a statutory and a common law right. The statutory right originated in *California Civil Code* section 3344, enacted in 1971, which, as originally enacted, authorized recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent. In 1979, the Supreme Court of California recognized a common law right of publicity, which it described as a "complement" to the statutory cause of action. *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 n.6 (Cal. 1979). However, the court held that because the common law right was derived from the law of privacy, the cause of action did not survive the death of the person whose identity was exploited and was not descendible to his or her heirs or assignees. *Id.* at 428-30. In 1984, the California Legislature in effect overruled that aspect of *Lugosi*, creating a second statutory right of publicity that was descendible to the heirs and assignees of deceased persons. CAL. CIV. CODE § 990 (West 1982 & Supp. 2002). In *Comedy III Productions* (the Three Stooges case) the Supreme Court of California treated the 1984 statute as modeled on the previous section 3344 and largely identical, but for the provisions extending the right beyond death. Section 990 reads in pertinent part:

Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result. . . .

“whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death,” whether or not the person actually used any of those features for commercial purposes while alive.¹⁴⁰ The statute expressly states that the rights it creates are “property rights” that are transferable before or after the personality dies, by contract, trust, or will.¹⁴¹ The right to require consent terminates if there is neither a transferee nor a survivor, or fifty years after the personality dies.¹⁴² The court held that neither the California statute’s fair-use-style exemptions, nor the First Amendment, gave others the right to traffic in the personas of The Three Stooges without authorization.¹⁴³

These kinds of decisions undoubtedly take some sustenance from the United States Supreme Court’s decision in *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁴⁴ The case involved the “human cannonball,” Hugo Zacchini, and his act, which involved getting shot from a cannon and flying two hundred feet through the air into a net.¹⁴⁵ Against his will, and without his permission, a local television station filmed his performance at a county fair, and broadcast his entire act, which lasted about fifteen seconds, for viewers.¹⁴⁶ The question before the Supreme Court was whether the First Amendment required the recognition of a “newsworthiness” privilege broad enough to immunize the television station for broadcasting Zacchini’s performance.¹⁴⁷ The Supreme Court held that no such First Amendment privilege existed, specifically analogizing the state-created privacy/property right to federal intellectual property law.¹⁴⁸ The court noted that protection

§ 990(a).

140. § 990(h).

141. § 990(b).

142. § 990(e), (g).

143. The law contains a number of exemptions similar to the “fair use” defense in copyright, exempting use. For example, “in connection with any news, public affairs, or sports broadcast or account, or any political campaign,” § 990(j), as well as uses in “[a] play, book, magazine, newspaper, musical composition, film, radio or television program,” § 990(n)(1), a work of “political or newsworthy value,” § 990(n)(2), “single and original works of fine art.” § 990(n)(3).

144. 433 U.S. 562 (1977).

145. *Id.* at 563.

146. *Id.* at 563–64.

147. *Id.* at 565.

148. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (stating “[i]n our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)

of the privacy/property right in such circumstances actually worked to foster and enhance First Amendment values, in much the same way that federal Copyright and Patent Law is said to advance the progress of the arts and sciences.¹⁴⁹ *Zacchini* was probably correct on its facts. But too often courts seem to have extrapolated too much from the holding, enforcing the right of publicity to extend to the intellectual property holder's rights, which is far more generous than necessary to encourage enterprise, and enormously detrimental to the robust flow of satire, parody, critique, homage, and take-off, that are the hallmarks of a free marketplace of ideas.

IV. CONCLUSION: SOME RESTORATIVE SUGGESTIONS

The first lesson that might be drawn from the assessment of the generally sad-sack state of modern privacy law is that privacy torts are generally weakest when the laws are purest and strongest and when the laws are alloyed in some sense with property concepts. The more that privacy law can be crafted in terms that borrow from property concepts, the stronger it will be. The two privacy torts most strongly affiliated with property concepts, intrusion (related to trespass) and appropriation (arguably a species of intellectual property), have already outperformed other privacy causes of action. To the extent that the weakest privacy tort, publication of private facts, is able to evolve with adaptations that are borrowed from property law, the strength and utility of the tort to plaintiffs will increase.

It is my guess that privacy law will strengthen in the future if there is an increasing "convergence" between the intrusion and private facts torts. This has already happened to some degree, and to the extent it continues, privacy protection will gather increased momentum. The convergence I am contemplating here is relatively simple: when an "intrusion" into a sphere of life in which the plaintiff has a reasonable expectation of privacy coincides with the publication of material that is ostensibly a private fact, the plaintiff's overall success in a privacy suit will be strengthened. As it stands now, legal doctrines appear to invite defendants to employ a "divide and

(stating "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate [the creation of useful works] for the general public good."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (stating "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

149. *Zacchini*, 433 U.S. at 576.

conquer” strategy, in which the intrusion side of the claim is entirely severed from the private facts side of the claim.¹⁵⁰ This renders the intrusion action largely meaningless, since only the damages recoverable from the intrusion itself are typically allowed, and it also renders the private facts cause of action subject to the traditional difficulties attendant to the newsworthiness defense.¹⁵¹

However, neither the damages limitation nor the newsworthiness device ought to interdict meaningful recovery by a plaintiff in tort when there is both an intrusion and a publication of a private fact, *unless* the private fact that is disclosed reveals criminal misconduct. This is the model recently followed by California in its Electronic Trespass Law.¹⁵² More significantly, in my judgment, it is the model that will eventually evolve as lower courts, and perhaps the United States Supreme Court itself, provide gloss and amplification of the *Bartnicki* decision.¹⁵³

In *Bartnicki*, it must be remembered that it was *only* the judgment of the two concurring Justices, Breyer and O'Connor, that the conduct being discussed in the intercepted conversation was “criminal,” which influenced them to treat the publication of the conversation as sufficiently newsworthy to require First Amendment protection.¹⁵⁴ *Bartnicki* would otherwise have been a true “convergence” case, in the sense that an intrusion like act—interception of a private conversation with a scanner—gave rise to publication of a private fact—a confidential conversation.¹⁵⁵ The “publisher” of the private fact was not the “intruder,” but surely knew that the material was the result of an intrusion. In such instances no privilege to traffic in the private fact ought to exist unless it reveals criminal conduct.¹⁵⁶

The day will eventually arrive when legal protection of privacy will finally come into its own in America. For all the frustrations that privacy law has endured in the last century, and for all the constant erosion of our privacy we now endure, through the confluence of such factors as new privacy-invading technology and new fears of terrorism, I believe that, in this century, the general societal yearning for a retrieval of the “right to be let alone” will grow steadily more intense. If, as Oliver Wendell Holmes

150. See *supra* notes 41–44 and accompanying text.

151. See *supra* notes 123–25 and accompanying text.

152. CAL. CIV. CODE § 1708.8 (West 2002).

153. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

154. *Id.* at 535.

155. See *supra* notes 94–97 and accompanying text.

156. See *supra* notes 99–104 and accompanying text.

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suggested, the law is the witness and external deposit of our moral life,¹⁵⁷ we can expect privacy law to gradually strengthen, as our moral life gradually evolves to demand it.

157. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

Book Review: Robert M. O'Neil, *The First Amendment and Civil Liability*, Indiana University Press, 2001 (xii, 184 pages) \$29.95.

Reviewed by Michael L. Richmond*

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I. INTRODUCTION

Richard Jewell lived a relatively quiet life until an explosion in the Olympic Park at the 1996 Atlanta Games culminated in the press magnifying rumors, and ultimately trumpeting Jewell as “the prime suspect in the bombing. His life became a nightmare, to the point where his attire, his weight, and even his treatment of a pet dog became fodder for gossip columns and talk shows.”¹ Later cleared of any complicity in the bombing, Jewell found, to his dismay, that the courts would refuse to entertain his libel action against the media that had figuratively drawn and quartered him.²

A young Florida woman, B.J.F., reported her rape to the local police department.³ A representative of the department placed the woman's name in the police blotter.⁴ A reporter for the local paper, having seen the blotter,

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1. ROBERT M. O'NEIL, *THE FIRST AMENDMENT AND CIVIL LIABILITY* 19 (2001).

2. *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001). The appellate decision was handed down after Professor O'Neil had completed his book.

3. *Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989).

4. *Id.*

wrote a story on the rape and included the young woman's name.⁵ Despite the paper's internal policy (and a state statute)⁶ against publishing the names of rape victims, the paper printed the name.⁷ The young woman, suffering shame and humiliation from the disclosure of her ordeal, found little solace in the judicial system when the system found the paper had not acted improperly since it received its information from public record.⁸

William James Sidis, a child prodigy in mathematics, suffered a nervous breakdown due to living in the public eye. Several years later, one of the leading lights in American journalism found him living the life of a recluse and wrote an article mercilessly exposing the former prodigy's sheltered and unremarkable lifestyle.⁹ Again, the courts offered no relief when the media had taken a quiet, private person's life and turned it topsy-turvy.¹⁰

All three of these people found themselves sacrificed on the altar of the First Amendment, watching their emotional life's blood stream down its sides. All three had no recourse and had to cope with the psychic and economic consequences of righting their lives, with no assistance from those who had wronged them. Professor Robert M. O'Neil, Director of the Thomas Jefferson Center for the Protection of Free Expression, sees little problem with denying their claims. Adopting the role of High Priest to the First Amendment, O'Neil dismisses *Jewell* briefly,¹¹ relegates *B.J.F.* to an endnote,¹² and does not mention *Sidis* at all. One would hypothesize that Professor O'Neil regards the lives destroyed by media attention as little more than the now infamous "collateral damage."¹³

5. *Id.*

6. "No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense" FLA. STAT. § 794.03 (2000).

7. *B.J.F.*, 491 U.S. at 527–28.

8. *Id.* at 538.

9. Later scholars disagree on whether James Thurber actually authored the article, or simply revised it prior to publication. The name attached to the article was "Jared L. Manley," but this might have been a Thurber pseudonym. Whatever the case, Thurber's typewriter figured significantly in producing the article. See *Bent Twig*, Time-Life Books, at <http://www.sidis.net/TimeLife.htm> (last visited June 18, 2002); *Good Will Sidis*, HARVARD MAG., at <http://www.harvard-magazine.com/issues/ma98/pump.html> (May 1998).

10. *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir. 1940).

11. O'NEIL, *supra* note 1, at 19–20.

12. *Id.* at 177.

13. Senator Bob Kerrey used the term "collateral damage" to describe children who died at the hands of his American soldiers attacking a village in the Mekong Delta during the

In his recent slim volume, Professor O'Neil points to what he views as potential areas in which future civil litigation may chill freedom of the press.¹⁴ Unfortunately, what could have proved an interesting and significant call to action suffers from maladies that substantially undermine his argument. He therefore does a significant disservice to those seeking to protect the media, a group that undeniably has many proponents and represents a vital position in an ongoing debate of substantial proportions. Most significantly, O'Neil fails to produce adequate evidence to support his sweeping thesis that "by the end of the decade [of the 1990s], there were few places for the news or entertainment media to hide. The First Amendment could no longer be invoked as a secure shield."¹⁵ Second, O'Neil distorts the import and impact of recent cases. Finally, Professor O'Neil commits the cardinal sin for a law professor of giving inadequate footnote references for later authors to utilize his discussion.

II. INCOMPLETE STORIES: MEDIA ETHICS AND UNMENTIONED CASES

In what Professor O'Neil describes as "surely one of the darkest hours of modern journalism,"¹⁶ Arthur Ashe told a shocked world that he had contracted AIDS.¹⁷ Ashe made the announcement under circumstances not his own choosing.¹⁸ Shortly before the announcement, a sportswriter called Ashe. The sportswriter had discovered Ashe's condition and would publish it in national media in a matter of days.¹⁹ Ashe, who made every effort to maintain a private life off the tennis court, had little choice but to make a public statement himself.²⁰ O'Neil uses the Ashe incident to introduce his concern that the continuing development of privacy law will jeopardize the media's protection under the First Amendment.²¹

Vietnam War. Timothy McVeigh was executed for destroying the Alfred P. Murrah Federal Building in Oklahoma City, causing the deaths of 168 people. "Timothy McVeigh appropriated the term collateral damage to describe the nineteen children whom he murdered in Oklahoma City." Lance Morrow, *Bob Kerrey and Collateral Damage*, at <http://www.time.com/time/nation/article/0,8599,108054,00.html> (Apr. 30, 2001).

14. In his preface, O'Neil speaks of "alarm bells" and "ominous portent[s]" which have led to "uncertainty and media anxiety." O'NEIL, *supra* note 1, at x-xi.

15. *Id.* at xi.

16. *Id.* at 83.

17. *Id.* at 78.

18. *Id.*

19. O'NEIL, *supra* note 1, at 78.

20. *Id.*

21. *Id.* at 83.

[I]t is not too early to ask whether the news media should be concerned about publicizing accurate and newsworthy information on . . . [whether a person has contracted AIDS]. Or can they continue to rely comfortably on a First Amendment defense for telling the truth, which would presumably provide a solid shield in any other situation?²²

One would expect Professor O'Neil to mount a thorough argument examining whether the established branch of privacy denominated public disclosure of private facts now threatens to burst the floodgates.²³ In this context, O'Neil argues that an ethical media would not have revealed Ashe's disease, and we should rely on media ethics for protection.²⁴

Should the sportswriter have intruded on Ashe's personal life and threatened to expose Ashe's disease? At the early stages, at least, AIDS would not affect Ashe as a professional tennis player. O'Neil himself acknowledges that: "A responsible student of the mass media would hope that the editor or publisher in sole possession of this news would have found some way not to release it—at least not until Mr. Ashe had time to do so in his own way."²⁵ Now, these noble words might express a valiant hope, but they have little to do with reality. Well before the days of Voltaire, humanity realized that it did not live "in this best of all possible worlds."²⁶ For one thing, even if we could expect *The New York Times* to conceal the story, we would hardly expect that *The National Enquirer* would follow suit.

But of greater significance, particularly in light of O'Neil's comment that we would hope the media would exercise some restraint, members of the media themselves have failed to give any indication that they would respect privacy. Statements of ethics, whether from national organizations or from the organs themselves, fail to reveal any significant concern for the privacy rights of individuals.²⁷ In short, not only could we expect the Ashe story to

22. *Id.*

23. The redoubtable William Prosser established four distinct areas of the privacy tort, among them public disclosure of private facts. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §117, at 809 (4th ed. 1971).

24. See *infra* text accompanying note 27.

25. O'NEIL, *supra* note 1, at 83.

26. FRANÇOIS MARIE AROUET DE VOLTAIRE, *CANDIDE* 4 (Easton Press ed., 1977, Richard Aldington, trans.) (1759).

27. One of the great American papers does protect the privacy of those involved in the news. *The San Francisco Chronicle* specifies: "We treat people with respect. This means having a high regard for personal privacy. Ordinary citizens have a greater right to privacy than public figures." SAN FRANCISCO CHRONICLE, *ETHICAL NEWS GATHERING*, at <http://www.asne.org/ideas/codes/sanfranciscochronicle.htm> (last updated Feb. 17,

appear in the *Enquirer*, we could also fully expect the *Times* to accord it significant coverage as well.

The American Society of Newspaper Editors (ASNE), in its "Statement of Principles," notes that "[j]ournalists should respect the rights of people involved in the news, observe the common standards of decency and stand accountable to the public for the fairness and accuracy of their news reports."²⁸ Yet, such general phrases as "rights of people" and "common standards of decency" hardly give sufficient guidance to editors and reporters in deciding whether to run a story or in what manner to attempt to gather facts. *The New York Times* has published guidelines which fall far short of the ASNE statement, commenting only obliquely in a section dealing with fictionalizing. "If compassion or the unavoidable conditions of reporting require shielding an identity, the preferred solution is to omit the name and explain the omission."²⁹ That small concession, used with the guarded language of "compassion" and confined to concealing an identity, can hardly rise to the level of giving subjects of journalistic inquiry any confidence that their personal lives will not decorate the pages of the *Times*. Similarly, *The Washington Post* offers little solace to the private person. "As a disseminator of the news, the paper shall observe the decencies that are obligatory upon a private gentleman."³⁰ Again, and as the *Post* emphasized following this broad statement, what a private gentleman might do varies with the time and social mores.³¹ The media, both in reporting news and in commentary, themselves create contemporary standards.³² Thus, in

1999). Even the *Chronicle*, however, allows for variations from the general rule when relative to the "relevance to the story." *Id.* On the other hand, the *Chronicle* does acknowledge that even though it may explore the personal conduct of public figures, private facts should appear in the paper with relation to "the degree to which private conduct bears on the discharge of public responsibility." *Id.*

28. AMERICAN SOCIETY OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES, Art. VI, at <http://www.asne.org/index.cfm?id=888> (last updated Aug. 28, 2002).

29. THE NEW YORK TIMES, GUIDELINES ON OUR INTEGRITY, at <http://www.asne.org/ideas/codes/newyorktimesintegrity.htm> (last updated Dec. 13, 2000).

30. THE WASHINGTON POST, STANDARDS AND ETHICS, at <http://www.asne.org/ideas/codes/washingtonpost.htm> (last updated Feb. 17, 1999). The *Post* also states that it "respects taste and decency, understanding that society's concepts of taste and decency are constantly changing." *Id.* However, paragraph I relates to the use of language in stories reported by the paper, and not to taste and decency in the manner in which the editors and reporters conduct themselves.

31. *Id.*

32. See, e.g., Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

citing common standards and decencies, the *Times* and the *Post* theoretically say little more than they will adhere to whatever norms they can convince the public to adopt.

A full discussion by Professor O'Neil of the Ashe incident should have at least called into question the possibility that responsible journalists would have delayed running the story of Ashe's disease. Regrettably, little exists in the media's own statements to justify O'Neil's conclusion that we can rely on the media's ethical standards to protect private matters. Undeniably, casting the media in a light other than benign hardly furthers O'Neil's primary argument, for the reader will have less cause to protect media that ride roughshod over individuals in quest of the almighty scoop. Yet, even a first-year law student learns that the effective advocate must forthrightly put forward conflicting arguments and cases, and must distinguish the negative while asserting the positive.³³

Leaving aside the question of whether media ethics would cause at least some editors to eschew reporting that Arthur Ashe had AIDS, there remains the issue of whether contemporary privacy law threatens media independence.³⁴ Consider first the evidence put forward by Professor O'Neil. He points to cases granting equitable relief against paparazzi who hounded Jacqueline Kennedy Onassis and later against others who equally tormented Arnold Schwarzenegger and Maria Shriver.³⁵ These cases, he argues, pose

Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.

Id. What Warren and Brandeis wrote over one hundred years ago rings even more loudly today, when the instruments of mass media reach the entire world and immediacy of reporting is measured in fractions of seconds rather than in hours or days.

33. See, e.g., HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* 279 (4th ed., 1999).

In the Argument, you develop reasons why your client should prevail in order to convince the court to accept your conclusions In addition, a successful argument requires you to explain away the points against you To ignore the case against you diminishes your credibility and the strength of your argument.

Id.

34. Suffice it to note that Professor Smolla's article elsewhere in this issue suggests that the law of privacy not only has developed minimally, but offers little meaningful opportunity for plaintiffs suing media defendants. Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289 (2003).

35. O'NEIL, *supra* note 1, at 88 (citing *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973)). O'Neil offers no citation to the Schwarzenegger case.

needless civil remedies which unduly restrain the newsgathering process. "The familiar existing sanctions against harassment, assault, stalking, and the like should suffice where genuine physical or even emotional harm results from invasive or trespassory image-gathering"³⁶ But again, O'Neil fails to tell the full story. The sanctions to which he refers exist in the sphere of criminal law, where procedural safeguards make successful prosecution far less likely than the successful pursuit of civil remedies in courts of equity.³⁷ Further, we would hardly believe that Professor O'Neil would champion criminal prosecution of over zealous reporters and photographers. Thus, relying on existing criminal remedies would prove an unlikely means of keeping an increasingly intrusive press from exceeding the bounds of decency.

Professor O'Neil points to another case involving paparazzi, this time hounding a more private target than the wife of a former president or two actors.³⁸ A married couple, senior executives of a corporation which had come under media scrutiny, refused to give interviews to the media.³⁹ Reporters and photographers flocked around their home and even followed them when they went on a vacation, renting a boat and using powerful microphones to spy on the couple.⁴⁰ Calling the behavior of the media "harassing, hounding, frightening and terrorizing,"⁴¹ the court enjoined any further intrusive activity.⁴² From these extreme facts, Professor O'Neil fears a flood of cases based on media behavior which might descend as low as mere petty annoyance. "The critical question, which courts have barely begun to address, is where and to what extent reasonable expectations of privacy beyond the home warrant some relief against unwelcome photographic invasions or intrusions."⁴³

Any number of cases have addressed the issue of intrusion on seclusion, creating a solid, accepted body of law that establishes parameters for a

36. *Id.* at 88.

37. The entire nation saw the difference between criminal prosecution and civil tort actions graphically and painfully displayed in the case of O. J. Simpson. Acquitted of the double murders of his ex-wife and her escort, Simpson suffered an economically crushing defeat in a wrongful death action brought by their estates. What the state failed to prove beyond a reasonable doubt, the plaintiffs could prove by a preponderance of the evidence.

38. O'NEIL, *supra* note 1, at 75.

39. *Id.*

40. *Id.*

41. *Id.* at 76 (quoting *Wolfson v. Lewis*, 924 F. Supp. 1423 (E.D. Pa. 1996)).

42. *Id.*

43. O'NEIL, *supra* note 1, at 89.

comfortable balance between reportage and seclusion.⁴⁴ Consider, for example, *Daily Times Democrat v. Graham*,⁴⁵ where a woman, leaving a carnival fun house, stepped on air jets that blew her skirt up over her waist.⁴⁶ An enterprising reporter snapped her photo, which his equally enterprising editor ran without her permission in the next edition of the local paper.⁴⁷ The Alabama Supreme Court affirmed a jury verdict for the woman, stating:

One who is a part of a public scene may be lawfully photographed as an incidental part of that scene in his ordinary status. Where the status he expects to occupy is changed without his volition to a status embarrassing to an ordinary person of reasonable sensitivity, then he should not be deemed to have forfeited his right to be protected from an indecent and vulgar intrusion of his right of privacy merely because misfortune overtakes him in a public place.⁴⁸

The press will incur liability only for excesses that amount to indecency and vulgarity, as stressed by *Daily Times Democrat*.⁴⁹ Similarly, media will escape liability for public disclosure of private facts when reporting a newsworthy matter, unless the facts divulged offend the conscience. For example, the president of the student body of a community college sued a newspaper that accurately reported that she had undergone a sex change operation years earlier.⁵⁰ At trial, a jury found by special verdict that the defendants had disclosed a private fact about the plaintiff which “was *not* newsworthy; the fact was highly offensive to a reasonable person of ordinary sensibilities; defendants disclosed the fact with knowledge that it was highly offensive or with reckless disregard of whether it was highly offensive; and

44. See generally RESTATEMENT (SECOND) OF TORTS § 652B (1976).

45. 162 So. 2d 474 (Ala. 1964).

46. *Id.* at 476.

47. *Id.*

48. *Id.* at 478.

49. *Id.* One should also note that where the media abandons its role in reporting the news and instead engages in an exclusively profit-making enterprise, it might become liable under the rubric of publicity. See, e.g., *Mendonsa v. Time, Inc.*, 678 F. Supp. 967, 968 (D.R.I. 1988). The famous “kissing sailor” photograph which signaled the end of the Second World War undeniably retains its newsworthy status even today. *Id.* Yet, when a publisher sought to sell limited edition copies of the photo at \$1600 each, the publisher had to obtain a written license from the sailor in order to publish, as the protection afforded by newsworthiness no longer applied. *Id.*

50. *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 766 (Ct. App. 1983).

the disclosure proximately caused injury or damage to [the plaintiff].”⁵¹ Again, liability hinged on the media reporting a fact not only private, but which the community found offensive to its cultural standards.⁵²

As noted earlier, the press itself plays an integral role in shaping contemporary attitudes and in expanding the standards by which the public gauges morality.⁵³ When the media creates the standards, it can hardly complain when it violates its own creation. The law of privacy does little more than allow the media to create the “breathing space” in which it can publish truth.⁵⁴ Who better to gauge the effect of its own articles than the press?

III. DISTORTED IMPACT

In *Rice v. Paladin Enterprises, Inc.*,⁵⁵ the defendant published a book entitled *Hit Man: A Technical Manual for Independent Contractors*.⁵⁶ True to its title, the book provided detailed instructions for any person desiring to pursue a career as a professional assassin.⁵⁷ It came as no surprise to the publishers, then, that a reader of the book followed the instructions faithfully and committed a treble murder for hire.⁵⁸ In the aftermath of these brutal

51. *Id.* (emphasis in original, numbering omitted). Note particularly that *Diaz* shifted the burden of proof on the newsworthiness issue from the defendant to the plaintiff. *Id.* at 769; see also *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998). It is worth noting that although Professor O’Neil criticizes *Shulman* for allowing the case to proceed, he neglects to note that *Shulman* also put a substantial burden on plaintiffs seeking to sue under its rubric. O’NEIL, *supra* note 1, at 74–75, 77. And, let us not forget that plaintiffs suing media defendants for defamatory utterances made in discussion of matters of public concern must now prove falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986). Thus, plaintiffs must now prove the traditional elements of their causes of action, but must also plead and prove the absence of two matters long considered affirmative defenses—newsworthiness and truth. *Id.*

52. Of the four branches of privacy mentioned in the Restatement, only appropriation of name or likeness does not require the plaintiff to demonstrate that the invasion of privacy is “highly offensive to a reasonable person.” RESTATEMENT (SECOND) OF TORTS §§ 652B (intrusion on seclusion), 652D (publicity given to private life), 652E (false light) (1976).

53. Warren & Brandeis, *supra* note 32, at 196.

54. *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

55. 128 F.3d 233 (4th Cir. 1997).

56. At <http://faculty-web.at.nwu.edu/commstud/freespeech/cont/cases/hitman.html> (last updated Jan. 1, 2001).

57. *Rice*, 128 F.3d at 236–41.

58. *Id.* at 240–41.

crimes, the personal representative of the decedents' estates sued the publisher in federal court in a wrongful death action based on state law.⁵⁹ At the summary judgment stage, the publisher argued that the First Amendment to the United States Constitution provided a blanket immunity from suit.⁶⁰ For the purposes of its motion, Paladin Enterprises made some remarkable concessions: 1) that it marketed the book in such a way as to attract criminals; 2) that it intended for and indeed knew that the book would be used by assassins; and 3) that it assisted the assassin in this particular case in committing the murders.⁶¹ Essentially, the defendant conceded that the court should view its publication of the book in the same light as if Paladin had written instructions to carry out the specific murders at the direct request of the assassin.⁶²

The appellate court found little trouble in reversing the district court's granting of the summary judgment motion.⁶³ In so doing, however, it made absolutely clear that its decision rested on the nature of the case as presented to it by the stipulations of fact.⁶⁴ "These stipulations are more than sufficient to foreclose an absolute First Amendment defense to plaintiffs' suit."⁶⁵ Indeed, the court so limited its decision that it felt obligated to criticize many of the *amici curiae* for their expansive view of the nature of the case.⁶⁶

That the national media organizations would feel obliged to vigorously defend Paladin's assertion of a constitutional right to *intentionally and knowingly* assist murderers with technical information which Paladin *admits* it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking.⁶⁷

Rice hardly serves as precedent for the traditional "copy cat" claim, none of which had survived the preliminary stages of litigation.⁶⁸ Where a

59. *Id.* at 241.

60. *Id.*

61. *Rice*, 128 F.3d at 241–42, n.2.

62. *Id.* at 241.

63. *Id.* at 267.

64. *Id.* at 253.

65. *Id.*

66. *Rice*, 128 F.3d at 265.

67. *Id.*

68. O'Neil himself grudgingly and secondarily acknowledges "the consistent pattern of publisher and producer non-liability for imitative or 'copy cat' crimes." O'NEIL, *supra* note 1, at 179. The acknowledgment, however, only comes in what passes for endnotes.

murderer saw a movie and acted similarly,⁶⁹ or where a child heard a song and committed suicide,⁷⁰ courts readily rejected later causes of action either because the nature of the second act meant it constituted a superceding, intervening cause to the claim of negligence, or because the defendant owed the particular plaintiff no duty. The trifold nature of the admissions in *Rice*—marketing for the purpose of assassination, intent that assassins utilize the book to commit crimes, and abetting the specific crime that caused the demise of plaintiffs’ *decedents*—makes the case virtually *sui generis*.

Soon after *Rice*, however, a Louisiana appellate court refused to dismiss a complaint which alleged that the producer of the movie *Natural Born Killers* intended for later copy cat crimes to result from the movie.⁷¹ No other case has since surfaced with a ruling against the defendant at any stage, nor have further developments arisen in the Louisiana case. Still, Professor O’Neil elects to grossly misrepresent the impact of *Rice*. “Thus, within a matter of months, the legal landscape had changed dramatically. The safe harbor that publishers, producers, and distributors had taken for granted for decades had suddenly vanished.”⁷² O’Neil seems to back away from this stunning characterization later, when he acknowledges that the intent element sets both *Rice* and *Byers* apart: “Thus, in both cases the defendants were willing to assume that, even if such an intent could be proved (however improbable that may have been), no legal liability could have been imposed.”⁷³ But his retrenchment is indeed short-lived, for on the next page he again wrings his hands in anguish over the danger he perceives stemming from these limited cases. “Moreover, once victims’ groups and plaintiffs’

69. O’NEIL, *supra* note 1, at 137–8.

70. *Id.* at 153–54 (discussing *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988)).

71. *Byers v. Edmondson*, 712 So. 2d 681, 691 (La. Ct. App. 1998).

72. O’NEIL, *supra* note 1, at 141. Professor O’Neil does not seem to like very much about *Rice* at all. He takes pains to point out that the judge who authored the opinion “was the son of parents who had been brutally murdered two decades earlier under circumstances so close to those of the *Rice v. Paladin* case he had seriously considered recusing himself but in the end decided he could be objective.” *Id.* at 140. He somewhat gently chides Rodney A. Smolla for representing the plaintiffs in *Rice*. “[Smolla’s] commitment to take on the case . . . seemed a departure from his lifelong defense of expressive and creative interests. Yet he became convinced that one who profited commercially from distributing material such as the *Hit Man Manual* did not merit categorical First Amendment protection.” *Id.* at 155–56.

73. *Id.* at 157.

lawyers taste media blood, as now they clearly have, life will never be the same.”⁷⁴

Hit Man proceeded to summary judgment on a rarified issue, and then only at the behest of the defendant. *Byers* survived dismissal of the complaint, to be sure, but the plaintiff faces one of the most daunting proofs in the tort panoply—that the producer knew or was substantially certain others would mimic the crime.⁷⁵ Indeed, to fit within the parameters of *Hit Man* and thus survive summary judgment, the plaintiff would have to prove the producers marketed *Natural Born Killers* to the criminal set, knew assassins would learn their trade from the movie, and perhaps even that they knew the specific assassin would use the movie to commit the crime. In any calling, actors find themselves subject to tort suits. Almost 370 years ago, John Donne wrote: “[L]awyers find out still/Litigious men, which quarrels move.”⁷⁶ Things have not changed much, and the possibility of a civil action

74. *Id.* at 158. Somehow, depicting the media as the Christians and the victims of their intrusiveness as the lions seems at best surreal.

75. “Proof of intent necessary for liability in cases such as the instant one will be remote and even rare . . .” *Byers*, 712 So. 2d at 691. See also *Rice*, 128 F.3d at 265 (“[T]here will almost never be evidence proffered from which a jury even *could* reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity.”). The element of acting with knowledge which surfaced in *Byers* underscores the United States Supreme Court’s solicitousness of the media in another line of cases. Unless the media actually participates in illegal activity in the newsgathering process, the courts will not permit either criminal sanctions or civil liability. The Court made this plain in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), where a radio station broadcast recordings of a cellular phone conversation. The tapes of the conversation appeared, infant-like, on the station’s doorstep but plainly came from an illegal interception. The radio station “did not participate in the interception, but they did know—or at least had reason to know—that the interception was unlawful.” *Id.* at 517–18. The Court refused to sanction either civil or criminal liability based on title 18, section 2510-11 of the *United States Code*, making it illegal to intercept or publish intercepted electronic communications. Without actually participating in the illegal acquiring of information, the media will not incur liability. This answered the questions remaining after *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), which protected the newspaper that had published the name of a rape victim obtained from official records open to the public. It also reaffirmed those cases holding the media could not trespass on property in the newsgathering process. See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999). The ABC reporters trespassed in that they gained access to areas of Food Lion stores closed to the public, and did so by misrepresenting their credentials. *Id.* at 510. Thus, the apparent consent of Food Lion to their presence in the meat department was vitiated by the misrepresentation. *Id.* But see O’NEIL, *supra* note 1, at 98. Thus, so long as the media stops short of participating in illegal activity, it may disseminate any material in its possession which is in the public interest.

76. JOHN DONNE, *THE CANONIZATION* (1633), available at <http://eir.library.utoronto.ca/rpo/display/displaypoem.cfm?poemnum=648>.

exists as a cost of doing business. Only when suits progress beyond the initial stages do they pose a real threat,⁷⁷ and to date none of the small number of copycat suits has made it beyond summary judgment.

IV. ENDNOTE PROBLEMS

[F]ootnotes have three basic functions: (1) they provide authority for assertions, and in so doing, provide a bibliography for further research; (2) they attribute borrowed materials to their sources; and (3) they continue a discussion begun in the text, but along lines somewhat peripheral to the logical development of the primary argument.⁷⁸

The problem with Professor O'Neil's failure to provide precise footnotes should in no way suggest improper attribution; instead, Professor O'Neil has violated the spirit of the first goal of footnotes, and the letter of the third. While not devoid of bibliographic material, O'Neil's book rather includes a scant eight pages of source references without pointing the reader to the specific places in the text (other than a vague chapter-by-chapter listing) to which the sources refer. The author justifies this sparse treatment by stating: "Although detailed footnotes seem incompatible with a book of this sort, familiar though they are to most legal scholars, some references are appropriate and essential."⁷⁹ Readers thus must wonder exactly what "sort" of book they hold in their hands, and unfortunately the pages of the volume fail to reveal how, if at all, *The First Amendment and Civil Liability* differs from any other text or treatise seeking to advance an argument on a point of law. For example, Marshall Shapo's highly regarded *The Duty to Act*⁸⁰ argued for a "fiduciary approach to governmental obligation"⁸¹ and appealed

77. See *Byers*, 712 So. 2d at 691.

Because this case is before us on a peremptory exception pleading the objection of no cause of action, we must accept this allegation [of intent] as true It is only by accepting the allegations in Byers' petition as true that we conclude that the film falls into the incitement to imminent lawless activity exception to the First Amendment.

Id.

78. ELIZABETH FAJANS & MARY R. FALK, *SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES, AND LAW REVIEW COMPETITION PAPERS* 106 (2d ed. 2000).

79. O'NEIL, *supra* note 1, at 173.

80. MARSHALL S. SHAPO, *THE DUTY TO ACT: TORT LAW, POWER, & PUBLIC POLICY* (1977).

81. *Id.* at 154.

to a wide audience reaching well beyond the legal community, yet contained thirty-five pages of meticulous notes.⁸²

The sketchy notes occasionally fail to identify sources precisely enough for the reader to track them down without substantial additional work. For the *Jewell* case noted above, Professor O'Neil gives us one sentence of explanation with no specific citation to the actual material on which he relies beyond a simple declaration that the material exists.⁸³ While readers have confidence in the accuracy of the statement, they will face a near impossible task if they wish to pursue the matter further. Plainly, Professor O'Neil had access to the order he mentions, for he gives us some details on the rationale of the court.⁸⁴ Why not share the bibliographic data with his readers? Similarly, citations to treatises in general will not serve the needs of readers looking either for specific guidance or simple overviews. For example, legal scholars regularly refer to both the Sanford and the Smolla treatises on defamation,⁸⁵ but would hardly hand either work to someone seeking basic information without more precise direction. Unfortunately, Professor O'Neil adopts this approach.⁸⁶ Finally, occasionally the reader will need a precise citation to pursue the concepts of other scholars. Professor O'Neil identifies a fascinating quotation from a recent book by Stanley Fish,⁸⁷ but gives readers no ability to find the quote and its related material without massive effort.⁸⁸ The book from which O'Neil took the quotation, *There's No Such*

82. *Id.* at 155–90.

83. “The ruling that Atlanta park guard Richard Jewell was a public figure was that of a Georgia state trial judge; though the decision was appealed, no further proceedings have been reported.” O'NEIL, *supra* note 1, at 174. Basic rules of citation, let alone fairness, require something further. O'Neil tells us only that the ruling occurred sometime in late 1999. *Id.* at 19. Even if the trial court's ruling went unreported, Rule 10.5(b) of *The Bluebook: A Uniform System of Citation* requires an author to “[g]ive the exact date for all unreported cases and for all cases cited to a looseleaf service, a slip opinion, an electronic database, or a newspaper.” THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.5(b), at 66 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

84. O'NEIL, *supra* note 1, at 19–20.

85. BRUCE W. SANFORD, SANFORD'S SYNOPSIS OF LIBEL AND PRIVACY (4th ed. 1991); RODNEY A. SMOLLA, LAW OF DEFAMATION (1986).

86. “For a comprehensive and up-to-date overview of the law of libel and slander, one might consult [the Sanford or Smolla treatises] . . .” O'NEIL, *supra* note 1, at 174. One might consult them for an overview, but one would quite likely feel overwhelmed by the thoroughness of either work.

87. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO (1994).

88. O'NEIL, *supra* note 1, at 9. At no point in the book does O'Neil indicate a page for the quotation from Fish.

Thing As Free Speech and It's a Good Thing, Too, contains 348 pages in the paperback edition.⁸⁹ That haystack would daunt legal scholars, let alone laypersons, searching for the quoted needle. Moreover, Professor O'Neil eschews the opportunity to digress or expand on such tantalizing passages as the Fish excerpt—a discussion that although relegated to a footnote would bear great interest for his readers.

In short, while Professor O'Neil makes a stab at including the scholarly apparatus one expects in a volume of legal thought, whether argumentative or scholarly, he falls far short of what the profession finds acceptable. He delineates the sources for his work, true, but fails to give his readers the ability to move further on specific issues.⁹⁰ His explanation for treating sources in this cavalier manner (it is not that kind of a book) fails to provide an acceptable reason for deviating as he has done from the minimum standards of legal practice.⁹¹ While some may regard these objections as idle carping, Professor O'Neil's refusal to properly annotate his book at the very least casts a questionable light on his effort to persuade others of the force of his argument.

V. CONCLUSION

Professor Robert O'Neil has written a seriously flawed book on a subject that deserves a far more balanced and scholarly treatment. Not since Anthony Lewis' excellent revisiting of the importance of *New York Times v. Sullivan*⁹² have we seen a full discussion of the vital importance of freedom of the press in a democratic society.⁹³ Today's world of media, by its sheer scope if nothing else, demands such a book. From the vanishing local daily to the vastness of the Internet, we see media the *New York Times* court could

89. FISH, *supra* note 87.

90. Indeed, even the index (although entirely the responsibility of the editor and not the author) occasionally erroneously refers the reader to pages where the topic is not discussed. See, e.g., the index entry for *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) which does not appear on the cited page 179, but which is found on page 177. O'NEIL, *supra* note 1, at 177.

91. In the movie *Michael*, John Travolta plays the Archangel Michael, who when importuned to perform miracles, responds: "I'm not that kind of angel." MICHAEL (New Line Cinema 1996). Archangels, he quite correctly suggests, exist to perform battle in the name of the Lord. *Id.* When O'Neil baldly asserts he has not written that kind of book, see *supra* text accompanying note 79, we are left to wonder what kind of book he in fact has produced.

92. 376 U.S. 254 (1964).

93. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (First Vintage Books ed. 1992) (1991).

hardly have contemplated, let alone the framers of the First Amendment. Journalism post-Watergate has adopted an aggressive, almost bullying, prying methodology, and, aided by technological advances that make it possible for the media to observe us even through the walls of our own homes, now has the ability to take upon itself a non-governmental Orwellian quality. The competition to control a market, whether by print or broadcast media, leads to a greater quest for a scoop. And all of this takes place in a society less concerned with appropriate conduct than ever, due in substantial part to the media's own creation. The media must also acknowledge and remedy its reluctance to adopt ethical standards of conduct that protect average citizens from prying.⁹⁴ Yet against all of these considerations, a democracy can only survive if its members have access to the information they need to make their decisions. The media must have the "breathing space"⁹⁵ to inform the public. We still need a study that harmonizes our need for a free press while avoiding the harm media can inflict.⁹⁶ What a pity, then, that Professor O'Neil failed to rise to the challenge. *The First Amendment and Civil Liability* promised so much. It delivered so little.

94. O'Neil does throw barbs at the media itself. "To the extent that [news and entertainment media] seek a more favorable reception in the courts of both law and public opinion, they might do well to look more often at their own practices and ask whether pressing free expression to its limits is always helpful." O'NEIL, *supra* note 1, at 170.

95. NAACP v. Button, 371 U.S. 415, 433 (1963).

96. Fifty years ago, a prominent American commented:

I, of course, believe in freedom of the press. It might be well, however, to define freedom of the press. I understand freedom of the press to mean freedom to print all of the truth regardless of how pleasant or unpleasant it may be, and regardless of who may be helped or hurt thereby.

JOE MCCARTHY, MCCARTHYISM: THE FIGHT FOR AMERICA 91 (Joseph Cellini ed., Ayer Co. 1988) (1952). One suspects that Professor O'Neil would agree with the sentiment, although detest the speaker. These words came from Joseph McCarthy, long reviled as one of the greatest opponents of freedom of speech in our country's history. That the ultimate Red-baiter would so vehemently espouse freedom of the press suggests that we must avoid absolutism in defending the media. McCarthy cared nothing for those he crushed in his fight against Communism—including a substantial number of members of the media. Using the First Amendment as an absolute shield when the media harms either the reputation or the equanimity of persons, whether private or public, perversely recalls the absolutist sword of McCarthyism.

No-Fault Publicity: Trying to Slam the Door Shut on Privacy—The Battle Between the Media and the Nonpublic Persons It Thrusts into the Public Eye

Adam Chrzan*

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I. INTRODUCTION—THE “RIGHT TO BE LET ALONE” IS BORN IN AMERICA

As early as age four, children develop a sense of privacy—the intermittent desire for others to leave them alone.¹ This almost primal desire continues to grow throughout each person’s life. Not surprisingly, Americans, as a whole, struggle for that same right in everything they do.²

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1. Age 4, at [http://www.kidsdirect.net/KD/ages/3-5\(4\).htm](http://www.kidsdirect.net/KD/ages/3-5(4).htm) (last visited Nov. 3, 2002). By age four, the attributes of modesty and privacy begin to emerge, and by puberty (age 9), they should have developed a significant desire for privacy. Age 9, at [http://www.kidsdirect.net/KD/ages/6-10\(9\).htm](http://www.kidsdirect.net/KD/ages/6-10(9).htm) (last visited Nov. 3, 2002).

2. Michael Kelly, 77 North Washington Street, THE ATLANTIC ONLINE, Mar. 2001, at <http://www.theatlantic.com/issues/2001/03/march77.htm> (citing *The Reinvention of Privacy* by Toby Lester, which contends that privacy “consistently ranks in the public-opinion surveys as a primary worry.”). Furthermore, privacy bulletin boards have sprung up on the Internet. One, called *Privacy*, at <http://motemind.topcities.com/law/privacy.htm> (last visited Mar. 25, 2002), debated how the media might be curbed from invading privacies when technology makes it so easy. “[P]rotecting privacy in the information age is like changing the tires on a

From work to financial matters to the mundane happenings of their everyday lives, Americans want to exercise their right “to be let alone.”³ Unfortunately, that same collective group also thirsts for the salacious, the shocking, and the striking. The country’s media strives to satiate that hunger with accounts of anything from bizarre car crashes to the sexual miscues of politicians to details of dastardly criminal dealings.⁴ When the media attempts to cover these events for its reading public, the right of privacy and the First Amendment clash.⁵ While First Amendment⁶ law leaves few surprises when it comes to the coverage afforded general-purpose public figures and public officials, the line begins to blur as the subjects of the story move further and further from those regularly in the limelight. All too often, common men, women, or children fall victim to a highly publicized event in which they never intended to participate, as newspapers, magazines, and television news magazines rush for readership and viewers.

This paper will consider how the right to privacy often collides with the public’s right to know. The carnage from that collision often ends in lawsuits that allege emotional pain, suffering, and humiliation, with frequent denials of recovery to the subjects of the stories once the media wields its First Amendment shield. This paper discusses the emergence of privacy, its current status, and its probable future. As this paper focuses on nonpublic people cast involuntarily into a public light, it only tangentially considers

moving car,” said one post by “FrayVader” in Oct. 1998. *Id.* Another post the same day, by “Msivorytower,” stated, “I fear we have become a nation addicted to voyeurism.” *Id.*

3. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

4. See John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-gotten Information*, 4 WM. & MARY BILL RTS. J. 1111, 1118 (1996); see also Wendy Kaminer, *I Spy*, THE AMERICAN PROSPECT, at <http://www.prospect.org/print/V11/18/kaminer-w.html> (last visited Mar. 21, 2002).

5. Walsh et al., *supra* note 4, at 1114. Walsh is a New York attorney specializing in First Amendment law who represented Food Lion, Inc. in its landmark RICO claim against Capital Cities and ABC, after a 1992 segment of *PrimeTime Live* used hidden cameras and deception to document hazardous food practices by the grocery chain. See *Food Lion Inc. v. Capital Cities/ABC Inc.*, 194 F.3d 505 (4th Cir. 1999).

6. “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. This amendment applies to the states through the Fourteenth Amendment, though many states have their own constitutional provisions to protect free speech and the press. Walsh et al., *supra* note 4, at 1114 (citing *Stromberg v. California*, 283 U.S. 359, 368 (1931)). In fact, California and New York boast constitutional clauses that actually offer broader protections than the First Amendment. *Id.* (citing *Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1278 (N.Y. 1991)).

actions by public figures and officials who do battle with the media over invasion of privacy issues, where the *New York Times Co. v. Sullivan* standard often applies.⁷

This paper analyzes how courts decide when media entities go too far when covering less-than-high profile people caught in news events through no fault of their own. They are the average Americans snared in news events: the crime victim, a motorist pinned in her car, the mistress of a politician snared in a scandal,⁸ the wife of a late-night talk show host,⁹ or a regular Joe wrongly accused of a fatal bombing.¹⁰

The roots of privacy lie in common law, for nothing in the United States Constitution promises a person privacy.¹¹ This enviable right surfaced for the first time when Louis D. Brandeis and Samuel D. Warren penned their famous 1890 *Harvard Law Review* article, "The Right to Privacy."¹² Here, the future Supreme Court justice and his law partner coined the oft-quoted phrase,¹³ "the right to be let alone,"¹⁴ as they crafted an article in response to

7. 376 U.S. 254, 279–80 (1964). Generally, this standard imposes upon public figures and public officials the need to show "actual malice" by the news outlet. *Id.* In other words, the individual has to show the defendant acted with knowledge of the statement's falsity or with reckless disregard of its truth. *Id.*

8. This, in no particular order, would include, most notably: Monica Lewinsky, the figure at the heart of the Clinton scandal; Donna Rice, the woman linked with former presidential candidate Gary Hart during his campaign; and Paula Jones, who claimed sexual harassment by Clinton during his Arkansas governor days. This is not to suggest that any or all of these women are or are not public figures, but merely the author's attempt to proffer women involved in political sex scandals that drew ink from the press.

9. See generally *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

10. Ellen Alderman & Caroline Kennedy, *The Legacy of Richard Jewell*, COLUM. JOURNALISM REV. (Mar./Apr. 1997), available at <http://www.cjr.org/year/97/2/jewell.asp>. Jewell was accused of the Centennial Olympic Park bombing in Atlanta in 1996. *Id.* He was cleared, but only after the media characterized him as a suspect in the bombing. *Id.*

11. In fact, privacy existed elsewhere in the world in the Middle Ages. Jewish jurisprudence made it illegal to build a window through which you could peer into your neighbor's courtyard. Paul M. Barrett, *Private Matters*, WASHINGTON MONTHLY (June 2000), available at <http://www.washingtonmonthly.com/books/2000/0006.barrett.html> (book review).

12. Maria Sguera, *The Competing Doctrines of Privacy and Free Speech Take Center Stage After Princess Diana's Death*, 15 N.Y.L. SCH. J. HUM. RTS. 205, 207 (1998).

13. *Id.* at 206. Brandeis took his seat on the country's high court in 1916. The two were attorneys in the same Boston law firm when they wrote the article, specifically in response to the publication of photographs of Warren's wife in newspapers without her consent, which the two saw as the advent of what now is referred to as the paparazzi. *Id.*

14. Warren & Brandeis, *supra* note 3, at 193. The two first speak of the right to life, the right to property, and "a recognition of man's spiritual nature, of his feelings and his intellect" before uttering the famous phrase. *Id.* The phrase, in fact, is mentioned often

what at the time they considered the “‘yellow journalism’” of tabloids.¹⁵ But the sentence in which the phrase, “the right to be let alone,” lies tells more of the attorneys’ thought processes, as they suggest “now the right to life has come to mean the right to enjoy life,—the right to be let alone.”¹⁶

Warren and Brandeis further suggest newspapers and new technologies “have invaded the sacred precincts of private and domestic life.”¹⁷ They called for courts to consider whether the law recognizes and protects peoples’ right to privacy, as “[t]he press is overstepping in every direction the obvious bounds of propriety and of decency.”¹⁸ Ultimately, they asked whether the law existing at that time afforded a principle to protect the privacy of the individual, and, if so, what the nature and extent of that protection was.¹⁹ They later likened the “right of the individual to be let

throughout the text of this seminal article on privacy rights. See *id.* at 193, 195, 205. The law review article and other literature mentioning it actually suggest that the phrase first was mentioned by Judge Cooley. Warren & Brandeis, *supra* note 3, at 195 (citing THOMAS M. COOLEY, LAW OF TORTS 29 (1880)).

15. Sguera, *supra* note 12, at 206. The two attorneys also considered “new technologies” troublesome to the right of privacy, as they allowed the media to more easily and rapidly gather and disseminate information about people. For example, it had been unlikely that someone could have his or her picture taken without actually “sitting” for it. But, with technological advances, photographs could be “surreptitiously” taken. That, they argued, left people no recourse for damages through contract and trust actions, and now required the protection of tort law. Warren & Brandeis, *supra* note 3, at 211. On another note, the yellow journalism at the time of the article likely differed from today’s concept of yellow journalism. Warren and Brandeis spoke of the encroachment of the media into private lives. *Id.* at 196. Today’s yellow journalism is generally considered to be tabloids, such as *The National Enquirer* or *The Star*, and has a certain inherent, gossip-like nature.

16. Warren & Brandeis, *supra* note 3, at 193.

17. *Id.* at 195. All this, the authors suggest, “threaten[s] to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’” *Id.* See Jane E. Kirtley, *It’s the Process, Stupid*, COLUM. JOURNALISM REV. (Sept./Oct. 2000), available at <http://www.cjr.org/year/00/3/kirtley.asp> (suggesting that new and technologically advanced video cameras and recording devices allow the press to become more intrusive). Kirtley, a professor at the University of Minnesota’s School of Journalism and Mass Communication, was executive director of The Reporters Committee for Freedom of the Press from 1985–1999. *Id.*

18. Warren & Brandeis, *supra* note 3, at 196. Further, the authors contend “[t]o satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.” *Id.* In fact, the authors offer a forward-thinking suggestion that, with life growing more complex and intense, the need for “solitude and privacy” are all the more essential to people and society. *Id.*

19. *Id.* at 197. The authors contrast the right to privacy with the law of defamation, libel, and slander, which they said dealt only with damage to reputation and injury to a

alone” with the “right[s] not to be assaulted or beaten, . . . imprisoned, . . . maliciously prosecuted . . . [or] defamed,”²⁰ and said courts could not find the right to privacy based in private property doctrine.²¹

They concluded with suggested elements on which to base a new privacy law.²² The right to privacy, they theorized, allowed the publication of any matter of “public or general interest.”²³ However, it protected people with whose affairs the community had no legitimate concern, “from being dragged into . . . undesired publicity.”²⁴ Because this standard rests entirely on the person being written about, Warren and Brandeis said it was impossible to create a hard-and-fast rule banning “obnoxious publications” and suggested any rule adopted must boast “elasticity.”²⁵ Other elements

person’s “external relations to the community.” *Id.* These “wrongs and correlative rights,” they said, “are in their nature material rather than spiritual,” leaving nothing on which to base a remedy for the “mere injury to the feelings.” Warren & Brandeis, *supra* note 3, at 197.

20. *Id.* at 205. If this right holds true for “thoughts, emotions, and sensations,” Warren and Brandeis said, these should receive protection, regardless of whether they are expressed in written form, in conduct, in attitudes, or even in facial expression. *Id.* at 206. They wanted to guard an individual against “ruthless publicity.” *Id.* at 214. For example, if a photographer could not, without consent, photograph a woman’s face, “much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination.” *Id.* at 214.

21. Warren & Brandeis, *supra* note 3, at 213. This is why the two urged that courts must *not* find this a new principle, but find it is a new application of an existing principle. To find otherwise would be termed judicial legislation. *Id.* n.1.

22. *Id.* at 214.

23. *Id.*

24. *Id.* at 214–15. The authors note “[t]here are others who, in varying degrees, have renounced the right to live their lives screened from public observation,” such as a political candidate. Warren & Brandeis, *supra* note 3, at 215. As an example, they suggest publicizing that a nonpublic citizen suffers from a speech impediment or “that he cannot spell correctly, is an unwarranted . . . infringement of his rights.” *Id.* However, the press’s reporting of the same shortcomings of a would-be congressman could not be “regarded as beyond the pale of propriety.” *Id.* at 215.

25. *Id.* at 215. Oddly, Warren and Brandeis offer a general rule that seems to address only those for public office or a public position and which prohibits publications concerning their private lives, habits, acts, and relations when they have no legitimate connection to the individual’s fitness for that office or position. *Id.* at 216. But there is no standard by which private acts are judged to be of “legitimate connection.” Warren & Brandeis, *supra* note 3, at 216. Warren and Brandeis, as a final statement for this first prong of a proposed new law, claim, “[s]ome things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.” *Id.* Warren and Brandeis contend oral disclosure would not provide a remedy for invasion of

proposed by the two men included a privacy right that ended once the person disclosed the facts publicly or consented to publication, and neither the truth of the matter nor absence of malice provided a defense.²⁶

II. PUBLIC V. PRIVATE—HOW THE COURTS DECIDE

Courts consider invasion of privacy a personal tort, one aimed at protecting an individual's feelings.²⁷ From this, the concept of four distinct common-law invasion-of-privacy torts evolved: 1) intrusion upon one's solitude or seclusion; 2) public disclosure of private facts; 3) publicity that places someone in a false light; and 4) appropriation of one's likeness or name for another's benefit.²⁸ A majority of states²⁹ and the *Restatement (Second) of Torts*³⁰ now recognize these torts, the first two of which are discussed in this article. Intrusion on one's seclusion and publication of private facts seem most applicable when discussing the media's coverage of the common man in the Twenty-First Century.

While laws exist, application sometimes proves exceedingly difficult, as invasion torts reach different levels for different people. Presidents, governors, and even clerks of small townships all may consider themselves to be public officials, and thus, find almost no assistance in invasion of privacy laws. Entertainers, professional sports figures, and corporate bigwigs fall into the public figure category and hold almost as limited a

privacy as any injury from an oral communication would "be so trifling that the law might well, in the interest of free speech, disregard it altogether." *Id.* at 217.

26. *Id.* at 218. The lack of a defense for truthful disclosures or absence of malice again goes to the heart of the right to privacy. The injury focused upon is not an individual's character, but that person's privacy, the authors contended. *Id.*

27. THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE FIRST AMENDMENT HANDBOOK, ch. 2 (1999), available at <http://www.rcfp.org/handbook/viewpage.cgi?0201> (last visited Mar. 21, 2002).

28. RESTATEMENT (SECOND) OF TORTS § 652A–E (1976). These all seem to stem from the belief that a person has a reasonable expectation of privacy in many of the things they do in everyday life. THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *supra* note 27, available at <http://www.rcfp.org/handbook/viewpage.cgi?0201>.

29. Sguera, *supra* note 12, at 210.

30. § 652A–E. This provides for injunctive and monetary relief, in some cases, for press misconduct. Warren and Brandeis looked at remedies and found the key to be money. Even in the absence of special damages, one who essentially injures another's privacy might expect to pay a hefty sum or face the prospect, in rare cases, of an injunction. Warren & Brandeis, *supra* note 3, at 217.

claim to a right of privacy.³¹ Murkier is the right of privacy for the involuntary public figure, the man who the press, through no fault of the individual, sometimes thrusts into the public eye.³² The message from courts resounds clearly: what many define as an invasion of privacy often is nothing more than the result of living in a free and open society, a privilege that requires the relinquishment of at least some privacy so that “information and opinion flow freely” and the people can maintain a free and democratic society.³³

Whenever involuntary or limited-purpose public figures attack the press for invading privacy, the Fourth Estate (i.e., the press) often asserts a claim of newsworthiness, supported by the public’s right to know.³⁴ And courts generally seem to side with the press’s constitutional First Amendment right instead of John Q. Public, who holds no such constitutional privilege. That generalization fails to curb a considerable amount of litigation over claims of privacy invasion against the media. The issue, in many cases, focuses on a person’s status and whether the invasion went beyond the public’s right to know, thus making it an unwarranted intrusion. For example, publishing intimate details of the president’s sex exploits fails to cross the threshold of privacy invasion because it is said the public has a right to know the moral, ethical, and personal dealings of the person it elected to run the country.³⁵ Publishing the same details of a nonpublic person’s sexual relations steps over that line.³⁶ The comments in the *Restatement (Second) of Torts* offer

31. THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *supra* note 27, available at <http://www.rcfp.org/handbook/viewpage.cgi?0201>. People who fall into one of these classes voluntarily expose themselves to scrutiny and essentially waive any right to privacy, at least in matters linked to their ability to perform their public duties or perform in public. *Id.*

32. *Id.*

33. Sguera, *supra* note 12, at 214, 221. This has been true since, and probably prior to, the adoption of the First Amendment in 1791. The amendment protects a journalist’s right to collect and disseminate, but does not give him complete civil or criminal immunity. *Id.* at 222.

34. *Id.* (citing Ann Sjoerdsma, *Journalism: Don’t Shoot the Messenger*, VIRGINIA-PILOT, Sept. 2, 1997, at E4).

35. See Deborah Potter, *The President, the Intern, and the Media: Journalism Ethics Under Siege*, at http://www.poynter.org/research/me/me_seige.htm (Feb. 16, 1998). However, that right does not mean the profession advocates the publication, though it may make it more likely due to increased competition, technological advances and changing ethics. *Id.*

36. See STUDENT PRESS LAW CENTER, *INVASION OF PRIVACY LAW*, at <http://www.splc.org/legalresearch.asp?id=29> (last visited Mar. 11, 2002). Courts say a person suing must show the information was sufficiently private or not already in the public domain, sufficiently intimate, and highly offensive to the reasonable person. The news organization defense then becomes one of newsworthiness. *Id.*

some of the best examples of trying to carve out a definition for voluntary and involuntary public figures.³⁷

Clearly, some individuals—voluntary public figures—place themselves in the public eye by engaging in public activities, by assuming prominent roles in society, public office, or institutions, or by submitting their work or themselves for public judgment.³⁸ These individuals hold little in the way of recourse when the press records their appearances or activities in their capacity as a voluntary public figure.³⁹

The difficulty of defining an involuntary public figure persists. For example, those who commit crimes, even though they do not seek publicity and actively try to avoid it, become “persons of public interest,” entitling the media to inform the public of their deeds.⁴⁰ Victims of crime, victims of accidents and catastrophes, and those involved in other “events that attract public attention” also fall into this category.⁴¹ Also ensnared in the net of involuntary public figures might be an acquitted murder defendant, a twelve-year-old girl who gives birth to a child, or a customer whose image is televised after being caught in a store raided by police looking for criminal activity.⁴² The key to all of these: newsworthiness.⁴³

There are individuals who become involuntary public figures simply because of the people with whom they associate, regardless of whether that association is within their control. People linked with a public figure or public official can expect their dealings, whether official or unofficial, to often be fair game for the press.⁴⁴ For instance, Monica Lewinsky’s affair with then-President Bill Clinton created such a stir and so affected the country’s affairs that there was no question that it fell within the ambit of

37. RESTATEMENT (SECOND) OF TORTS § 652D cmt. e, f (1976).

38. § 652D cmt. e. These individuals might include an actor, a prizefighter, or a government official. *Id.* Some argue that once a person enters the spotlight, they are public forever. Howard Kurtz, *Questions of Privacy*, WASH. POST, Apr. 23, 1992, at D1 (noting an incident involving Ron Nessen, former President Gerald Ford’s press secretary, whose twenty-five-year-old love letters to his ex-wife were published by *The Washingtonian* after Nessen left his position).

39. § 652D cmt. e.

40. § 652D cmt. f.

41. *Id.* In most cases, these people have not sought the public eye, but have been involuntarily thrust into it, through no fault of their own.

42. *Id.* illus. 13–17.

43. § 652D cmt. g.

44. One news story suggested that some individuals are “dragged into the spotlight through an accident of birth or circumstance. Would anyone care that a college student named John Zaccaro Jr. was busted for cocaine if his mother wasn’t [former presidential candidate Walter Mondale’s] running mate] Geraldine Ferraro?” Kurtz, *supra* note 38.

newsworthiness.⁴⁵ As Paul M. Barrett wrote three years ago in the *Washington Monthly*, “[w]hile there is no law against repeatedly having adulterous oral sex with the president of the United States, a woman who does it in and around the Oval Office might reasonably be expected to anticipate that word could get out, causing her some loss of privacy.”⁴⁶

Donna Rice also struggled with her newfound fame after the press exposed her romantic liaison with Democratic presidential contender Gary Hart.⁴⁷ In interview after interview, she questioned the integrity of the press in creating public figures out of private individuals. “I don’t think that the media has a right to make a private person a public person,” she told Barbara Walters during a 20/20 interview in 1987.⁴⁸ The following year, the media hammered Rice when she reneged on a promise to be a panelist at the 1988 Society of Professional Journalists’ National Convention.⁴⁹ She reportedly wanted to tell news types how the press rocked her life after the Hart affair.⁵⁰ “You can’t have an affair with a presidential candidate and not expect to be made a public figure,” *Cincinnati Post* reporter Sarah Sturmon said, after Rice ditched the Right to Privacy panel at the last minute.⁵¹

Clearly, Rice does not stand alone. Other women caught in the web of political scandal have shot themselves in the foot when trying to stay out of the public eye. They include Jessica Hahn, who invited reporters to her

45. *Id.* Ironically, in his *Washington Post* article, Kurtz suggests that news organizations contend their reportage of politicians’ extramarital affairs focused on whether the affairs affected the politicians’ public performances. That changed in 1987, when *The Miami Herald* uncovered the Gary Hart-Donna Rice affair during his bid to become the Democratic nominee for president. The justification for reporting on Hart turned on his dare to reporters to tail him. *Id.*

46. Barrett, *supra* note 11. Barrett reports legal affairs for *The Wall Street Journal*. *Id.* See also Andrea Lee Negroni, *Privacy and the Prying Eyes of Cyberspace*, MORTGAGE BANKING, Apr. 1, 2000, at 76.

47. Robert Friedman, *The Age of Exhibitionism*, ST. PETERSBURG TIMES (Fla.), June 28, 1987, at 5D. Ironically, Rice went on ABC’s 20/20 newsmagazine and told Barbara Walters and 30 million viewers how the Gary Hart affair publicity had devastated her. *Id.* In November 1988, Rice agreed to be a speaker on the Right to Privacy panel at the Society of Professional Journalists’ National Convention but ducked out and away from a throng of reporters and photographers covering her appearance on the panel. William Swislow, *If You’re Allergic to Animals, Don’t Go to the Zoo: Reflections on the Donna Rice Affair, Cincinnati Episode*, THE QUILL, Jan. 1989, at 22.

48. Interview by Barbara Walters with Donna Rice, 20/20 (ABC television broadcast, June 18, 1987).

49. Swislow, *supra* note 47, at 22.

50. *Id.*

51. *Id.*

house to detail the trauma of her affair-gone-public with television evangelist Jim Baker, and Fawn Hall, who testified before Iran-Contra investigators about her secretarial duties with Oliver North.⁵²

In some cases, just being the spouse of someone famous triggers the involuntary public figure standard.⁵³ A United States court of appeals held, more than twenty-five years ago, that the wife of entertainer Johnny Carson fell into the public domain simply because she was married to Carson, a public figure.⁵⁴ "One can assume that the wife of a public figure such as Carson more or less automatically becomes at least a part-time public figure herself," the court said.⁵⁵

A *Restatement (Second) of Torts* definition of "news" also provides help. News, it states, falls "within the scope of legitimate public concern," and often is defined by publishers and broadcasters acting "in accordance with the mores of the community."⁵⁶ "Authorized publicity" of an individual includes accounts of those involved in homicides and other crimes, arrests, police raids, suicides, marriages and divorces, natural disasters, and drug deaths, as well as "many other similar matters of genuine, even if more or less deplorable, popular appeal."⁵⁷ With definitions such as these, it is not surprising that almost anyone who steps outside his or her house (and even those who do not)⁵⁸ may fall prey to the press's push to place people in the

52. Friedman, *supra* note 47.

53. Carolyn Condit, wife of Rep. Gary Condit (D-Cal.), has filed a \$10 million libel lawsuit against the *National Enquirer* over publicity she received after her husband's relationship with Washington intern, Chandra Levy, surfaced after Levy's disappearance in Spring 2001. Condit v. Nat'l Enquirer, Inc. No. CIV F 02-5198, 2002 U.S. Dist. LEXIS 16107 (E.D. Cal. July 10, 2002). The case posed the question of whether Mrs. Condit was a public figure because of her marriage to the congressman. She remained a California resident while her husband lived in Washington, but she did appear in his campaign ads and posed with him for a *People* magazine cover in 2001. Michael Doyle, *Public-figure Question Key to Case*, FRESNO BEE, Feb. 22, 2002, at A15.

54. Carson v. Allied News Co., 529 F.2d 206, 210 (7th Cir. 1976).

55. *Id.* Johnny Carson was a party to the suit, which was framed as a libel action against *National Insider*, a tabloid periodical. *Id.* at 208. It was dismissed on summary judgment in favor of Allied News Co., the defendant. Joanna Holland joined her husband in the suit. *Id.*

56. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1976).

57. *Id.*

58. Cantrell v. Forest City Publ'g Co., 484 F.2d 150 (6th Cir. 1973). *The Cleveland Plain Dealer*, in a follow-up story about a bridge collapse, visited a family whose husband and father had died in the 1967 tragedy. *Id.* at 152. A reporter and photographer came into the family's house, when the mother was gone, and spoke with the children. *Id.* The court held the item was newsworthy, appearing only nine months after the initial story. *Id.* at 154. "The

public eye. Accident victims,⁵⁹ crime victims,⁶⁰ and even criminals⁶¹ stand defenseless against press decisions to publicize their plights.

There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion . . . So where a person . . . by the particular character of his conduct or activities has acquired, or has had thrust upon him, public notoriety, he relinquishes the right to live that segment of his life which has thus engaged the public interest absolutely free from public scrutiny.⁶²

Here, courts show they are loathe to dispatch the First Amendment's underpinnings.

III. BALANCING PRIVACY AND FREE SPEECH

In the purest sense, the battle over privacy pits freedom of the press against freedom *from* the press.⁶³ "We [are] dealing with that most fragile of merchandise, the facts about another human being," *People* magazine founding Managing Editor, Richard Stolley, told a writers' workshop in 1995. "[P]rivacy . . . involves a collision between the First Amendment, freedom of the press, and the Fourth and Fourteen[th] amendments[,] which have been interpreted to mean freedom from the press."⁶⁴

Courts across the country strike differing measures for how far they will allow the press to carry its First Amendment privilege. Privacy cases began

judgment of what is newsworthy must remain primarily a function of the publisher," the court stated. *Id.* at 156.

59. *Shulman v. Group W Prod., Inc.*, 955 P.2d 469 (Cal. 1998).

60. *Poteet v. Roswell Daily Record, Inc.*, 584 P.2d 1310 (N.M. Ct. App. 1978). *See also* *Bloch v. Ribar*, 156 F.3d 673, 676, 687 (6th Cir. 1998) (affirming dismissal of privacy claim against sheriff who released rape victim's intimate and "extremely humiliating" details of her assault).

61. *Smith v. NBC*, 292 P.2d 600 (Cal. Ct. App. 1956).

62. *Id.* at 603 (citing *Stryker v. Republic Pictures Corp.*, 238 P.2d 670 (Cal. Ct. App. 1956)).

63. Richard Stolley, Speech at National Writers' Workshop, Hartford, Conn. (Apr. 1, 1995). Stolley, in 1974, became the founding editor for *People* magazine and is credited with inventing the term "personality journalism." *Id.*

64. *Id.* Stolley suggests the turning point in publishing private facts is when the "private facts become so newsworthy that their publication is justified." *Id.* For *People* magazine's "personality journalism" that was a fine line. "In one sense, every story we did was an invasion of somebody's privacy," Stolley told the workshop. *Id.*

to find their way into the courts regularly in the 1960s, 1970s, and the 1980s, although the *New York Times Co. v. Sullivan*⁶⁵ and *Hustler Magazine v. Falwell*⁶⁶ cases, for example, saw the courts support the First Amendment and impose heavy burdens of proof on those who sued.⁶⁷ In fact, First Amendment scholar Alexander Meiklejohn, in response to the *Sullivan* decision, proclaimed it was a time for “dancing in the streets.”⁶⁸ Anthony Lewis suggests that the First Amendment boasts tremendous power in the privacy-publicity battle.⁶⁹ “But despite all those legal trappings, those grounds for recovery of damages, lawsuits for violation of the right to privacy, have not often proved fruitful.”⁷⁰ Lewis cites the case of *Sidis v. F-R Publishing Corp.*⁷¹ as proof courts often side with the media in privacy-invasion cases.⁷²

But the media’s collective belief that the First Amendment would shield it from legal action for its newsgathering techniques began to fizzle in the 1980s and 1990s.⁷³ Cases marching into the courts forced those courts to begin weighing the press’s invasion against the public’s right to know.⁷⁴ Courts struggled with this delicate balance, giving ground to plaintiffs suing the media. “[T]he virtually absolute status of the [First] Amendment somehow doesn’t seem to make as much sense to [the courts] in 1990 as it

65. 376 U.S. 254 (1964).

66. 485 U.S. 46 (1988).

67. See generally Kirtley, *supra* note 17, available at <http://www.cjr.org/year/00/3/kirtley.asp>.

68. *Libel? You'll Have to Prove It*, COLUM. JOURNALISM REV. (Nov./Dec. 2001), available at <http://www.cjr.org/year/01/6/1964.asp>.

69. Anthony Lewis, Goodwin Seminar Speech, Shepard Broad Law Center, Nova Southeastern University, Ft. Lauderdale, Fla. (Apr. 11, 2002). Lewis authored the book *Gideon's Trumpet*.

70. *Id.*

71. 113 F.2d 806 (2d Cir. 1940). *Sidis* was a child prodigy who, after having his storied childhood chronicled by the press, dropped out of sight. *Id.* at 807. A story in the late 1930s detailed *Sidis's* current status as living alone in a run-down building in Boston. *Id.* He sued for invasion of privacy and lost, as the Second Circuit refused to grant “all of the intimate details of private life an absolute immunity from the prying of the press.” *Id.* at 809.

72. Lewis, *supra* note 69.

73. Kirtley, *supra* note 17, available at <http://www.cjr.org/year/00/3/kirtley.asp>.

74. Noted media professor Rodney Smolla contended a decade ago that while the “basic structure of *New York Times v. Sullivan* is solid,” courts would begin to “cut back on the [freedom of the press’s] edges everywhere it can” in response to the media’s overstepping of its First Amendment privilege. W. John Moore, *Press Clipping*, 22 NAT’L J. 3086 (1990). The article quotes several media lawyers speculating that First Amendment litigation would spike in the 1990s.

did in 1791,” explained Jane Kirtley, executive director of the Reporters Committee for Freedom of the Press.⁷⁵

*Time, Inc. v. Hill*⁷⁶ marked the first true case of privacy versus a free press when the United States Supreme Court considered the privacy-invasion claim of a family held hostage for nineteen hours by three prison escapees.⁷⁷ The harrowing experience was turned into a play approximately two years after the incident.⁷⁸ *Life* magazine, in a feature on “The Desperate Hours,” ran photos and a story of the incident, triggering a new round of severe emotional trauma for the Hill family.⁷⁹ The Court, in a 5-4 decision, set aside a \$30,000 judgment James Hill had won in a lower court.⁸⁰ Justice Brennan’s majority opinion found “[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.”⁸¹ A dissenting Justice Harlan countered that the inherent dangers of a free press included “a severe risk of irremediable harm to individuals involuntarily exposed to [publicity] and powerless to protect themselves against it.”⁸²

These two *Hill* views boldly drew the battle lines for the free press-versus-privacy debate that continues in this country today. The media acts as a watchdog for a country looking for information on which to base opinion, decision, and debate.⁸³ Too much control over publications, and the danger clearly becomes exactly what the free speech clause seeks to eliminate: a chilling effect on the press and a society that suffers from

75. *Id.*

76. 385 U.S. 374 (1967).

77. *Id.* at 378.

78. *Id.* The Hill family sued under the New York privacy statute, N.Y. CIV. RIGHTS LAW §§ 50–51. *Id.* n.1. The statute requires first obtaining written consent of a person before their name, portrait, or picture is used for commercial purposes. *Id.*

79. *Time*, 385 U.S. at 377.

80. *Id.* at 379, 398.

81. *Id.* at 388.

82. *Id.* at 410 (Harlan, J., concurring in part and dissenting in part).

83. When the press oversteps its bounds and “roams into our cherished private-sphere, it seems to turn dangerous and predatory. And then we Americans turn on the press.” Kevin P. Quinn, *AMERICA*, Apr. 20, 1996, at 28 (book review).

stifled discourse on key issues in its communities.⁸⁴ Too little, and we risk the same result.⁸⁵

Some scholars argue the media risks far more than litigation when digging into people's past and present; they risk reputation. Again, the press must balance its attempts to please both types of reader: those looking for news and shocked at privacy invasions, and those thirsting for salacious, down-and-dirty details that offer little news value. Often, those readers are one and the same.⁸⁶

IV. THE CASE FOR INVOLUNTARY PUBLIC FIGURE

Case law in privacy-invasion claims is a mixed bag, with courts using different standards to reach a multitude of conclusions. Almost as varied as the final rulings are the facts relied on in each case to reach the end result. But before this article examines the cases involving privacy claims, two instances, neither of which resulted in any type of litigation, stand for how unwanted media publicity can wreak havoc with those involved in the story.

Robert O'Donnell leaped into the national spotlight in 1987, after he slunk down a narrow well pipe in Texas to save an eighteen-month-old girl. He garnered hero status, appeared in a parade, made numerous television appearances, and collected a White House salute.⁸⁷ Then the limelight waned, O'Donnell's marriage fell apart, and an addiction to prescription drugs led to his dismissal from the fire department.⁸⁸ In April 1995, four days after watching rescue workers try to save survivors from the bombed

84. *Branzburg v. Hayes*, 408 U.S. 665 (1972). Justice Byron White's opinion stated: "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681.

85. See Alexandra Varney McDonald, *Hazy Future for Hidden Cameras*, A.B.A. J., Oct. 1999, at 31. Los Angeles free speech attorney Neville L. Johnson is quoted within the article as saying that with a lack of privacy "the ultimate victim will be the First Amendment because people will be more circumspect and closed in discussion[], . . . deter[ring] what the First Amendment seeks to promote: the free and robust exchange of ideas." *Id.*

86. Kurtz, *supra* note 38. Kurtz quotes Todd Gitlin, a sociology professor at the University of California, Berkeley: "Everyone is both a voyeur and a citizen The voyeur is reading with eyeballs bugging out, while the citizen is saying 'These abominations are sinking lower once more.'" *Id.* Kurtz also notes in his story that a Boston radio show host, "pissed off" at *USA Today's* story of tennis star Arthur Ashe's AIDS illness, offered a \$1,000 reward to listeners who could supply "dirt" on the newspaper's top editors. *Id.*

87. David Andreatta, *Coming Down From Hero High*, TIMES-PICAYUNE, Mar. 21, 2002, available at 2002 WL 3089527.

88. *Id.* In fact, an O'Donnell book deal fell through and a cameo appearance in a movie was cut from the final version. *Id.*

Murrah Federal Building in Oklahoma City, Oklahoma, O'Donnell used a shotgun to kill himself.⁸⁹ Hero status imparted by press coverage can devastate, experts say. "Becoming a hero is like living in a balloon that is blown up and deflated," said Chuck Niedzialkowski, a counselor who specializes in disaster-related mental health work.⁹⁰ Firefighters involved in the September 11, 2001 World Trade Center tragedy echo those sentiments. "It was difficult getting used to the recognition," New York City firefighter Don Dillon said. "We weren't ready for it. We didn't expect it."⁹¹

Thomas Baiter "died" in the World Trade Center attack but lived to tell about it. Newspapers and the Internet listed Baiter, who was employed on the ninety-sixth floor, as dead, and forced him to spend days informing family and friends that he was not.⁹² The miscue by the media did not devastate Baiter's life, but in his eyes, it constituted an "annoying" invasion of privacy.⁹³ So each intrusion differs, and each person, whether directly or indirectly touched, is affected in a different way.

Looking at case law involving privacy paints a disjointed portrait of where courts stand with media intrusion actions. Some things remain constant. For instance, generally, no intrusion is actionable when a person is in public and in plain view.⁹⁴ Three young boys sued *Playboy* after a picture of them taken with a Springfield, Ohio policewoman, helping them with their bicycle, ran with a nude pictorial of the officer in May 1982.⁹⁵ The boys contended the innocent photograph destroyed their right of privacy and humiliated and disgraced them.⁹⁶ Citing the *Restatement (Second) of Torts*,⁹⁷ the trial court said a person was subject to liability "only when he has intruded into a private place, or has otherwise invaded a private seclusion."⁹⁸ The photograph, the trial court found, showed the children and the policewoman on a public sidewalk "in plain view of the public eye," and

89. *Id.* He reportedly told his mother, "[w]hen those rescuers are through, they're going to need lots of help . . . for years." *Id.*

90. Andreatta, *supra* note 87. This is the same fate that seemed to strike James Hill's wife after *Life* magazine ran its piece on the play recounting their hostage experience. Mrs. Hill suffered a nervous breakdown. Lewis, *supra* note 69.

91. Andreatta, *supra* note 87.

92. *The Point* (CNN television broadcast, Dec. 5, 2001).

93. *Id.*

94. *But see* Gallela v. Onassis, 487 F.2d 986 (2d Cir. 1973); Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964).

95. Jackson v. Playboy Enter., Inc., 574 F. Supp. 10 (S.D. Ohio 1983).

96. *Id.* at 11.

97. RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1976).

98. Jackson, 574 F. Supp. at 13.

plaintiffs could not show the activity was solely a matter of private concern.⁹⁹

Richard Jewell, the security guard initially pegged as a hero in the 1996 Summer Olympics bombing at Centennial Park in Atlanta, sued several news organizations after media reports prematurely dubbed him a suspect in the bombing.¹⁰⁰ Jewell, in a suit against the *Atlanta Journal-Constitution*,¹⁰¹ asserted he was a private individual. The court, in affirming the trial court's holding, found that Jewell was a "voluntary limited-purpose public figure,"¹⁰² and cited the *Gertz v. Robert Welch, Inc.*¹⁰³ standard:

Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures. . . . More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.¹⁰⁴

Jewell argued he never assumed a role of special prominence in the bombing issue and never thrust himself into the controversy.¹⁰⁵ The trial court, which was affirmed on appeal, held that Jewell granted numerous interviews and a photo shoot, and thus rendered himself a public figure for this situation.¹⁰⁶

99. *Id.*

100. See generally *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998); *Jewell v. Capital Cities/ABC, Inc.*, 97 CIV 5617, 1998 U.S. Dist. LEXIS 15765, at *1 (S.D.N.Y. Sept. 30, 1998). Jewell, prior to filing a claim against NBC, settled with the network for more than \$500,000. Report: *Richard Jewell to Get More Than \$500,000 from NBC*, at <http://www.cnn.com/US/9701/03/olympic.bombing/> (Jan 3, 1997).

101. *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001). The suit actually was a libel action, although it offers a working definition of limited-purpose public figures. The appellate action combined three cases. *Id.* at 178. The one referred to here is Case No. A01A1565, in which the lower court denied his partial motion for summary judgment. *Id.* at 182.

102. *Id.* at 183.

103. 418 U.S. 323 (1974).

104. *Atlanta Journal-Constitution*, 555 S.E.2d at 183 (quoting *Gertz*, 418 U.S. at 342, 345).

105. *Id.* at 183.

106. *Id.* at 185. The appellate court noted Jewell was "prominent enough" to hire a media coordinator to field press inquiries and schedule appearances. *Id.* at 184.

Thrusting oneself into the public eye, even unwittingly, places a person within the press's reach. In *Smith v. National Broadcasting Co.*,¹⁰⁷ a Los Angeles man's report of the escape of a black panther created fear and turmoil in and around the city. Three months later, after the fervor died down and Smith's life returned to normal, an NBC radio station broadcast a reenactment of the black panther hunt based on Smith's report and his subsequent arrest for filing a false police report.¹⁰⁸ Smith sued for invasion of privacy, and a California appellate court held he had brought the invasion on himself. "By his participation in what ultimately proved to be a baseless report . . . plaintiff became stamped with the imprint of public notoriety and renounced his right of privacy . . . for '[t]here can be no privacy in that which is already public.'"¹⁰⁹

In *Jacova v. Southern Radio and Television Co.*,¹¹⁰ the plaintiff was not a criminal, but claimed he appeared as one on television, after a videotape taken during a police raid on a Miami Beach cigar shop aired on the evening news.¹¹¹ Jacova entered the shop as a customer and, after the gambling raid, ended up being filmed while talking with a law officer.¹¹² The footage ran with a voice over that, Jacova claimed, made it appear that he was being arrested.¹¹³ The Supreme Court of Florida ruled that broadcasters had a qualified privilege to use the name or picture of someone "who has become an 'actor' in a newsworthy event."¹¹⁴ The court then tackled the question of when a person becomes an actor in a public event and cited a New York court's dicta:

One traveling upon the public highway may expect to be televised, but only as an incidental part of the general scene. So, one attending a public event such as a professional football game may expect to be televised in the status in which he attends. If a mere spectator, he may be taken as part of the general audience, but may not be picked out of a crowd alone, thrust upon the screen and unduly fea-

107. 292 P.2d 600 (Cal. Ct. App. 1956).

108. *Id.* at 602.

109. *Id.* at 603 (citing *Melvin v. Reid*, 297 P. 91, 93 (Cal. Ct. App. 1931)). *But see* *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 118 Cal. Rptr. 370 (Ct. App. 1974) (stating "[it] would be a crass legal fiction to assert that a matter once public never becomes private again." (quoting *Briscoe v. Reader's Digest Ass'n.*, 483 P.2d 34, 41 (Cal. 1971))).

110. 83 So. 2d 34 (Fla. 1955).

111. *Id.* at 35.

112. *Id.*

113. *Id.*

114. *Id.* at 37.

tured for public view. *Where, however, one is a public personage, an actual participant in a public event, or where some newsworthy incident affecting him is taking place, the right of privacy is not absolute, but limited.*¹¹⁵

The Florida high court then found the airing of the plaintiff's picture was not an unreasonable or unwarranted invasion of privacy.¹¹⁶

Courts show little sympathy to crime victims, who carry almost no protection from press publicity. After an assailant shot Susan Barker and murdered her companion, and before the killer was caught, a newspaper published her name and address.¹¹⁷ Barker sued for invasion of privacy, but the court sustained dismissal of the case, finding Barker had been thrust into the public eye in an event that was of legitimate public concern and logically connected with the publication of her name and address.¹¹⁸ "The right of the individual to privacy is limited by the public's right to have a free dissemination of news and information."¹¹⁹ A similar case involved the publication of a fourteen-year-old sexual assault victim's name after its release during a court hearing.¹²⁰ The plaintiff argued the publication was not newsworthy and therefore not privileged.¹²¹ The appellate court affirmed summary judgment for the defendant newspaper, finding the incident was one of public record, making it newsworthy and "privileged as a matter of law."¹²²

The public records defense becomes a potent weapon for the press in publication of private or embarrassing facts. In *Wolf v. Regardie*,¹²³ the plaintiff tried to thwart a story on his development projects in a Washington, D.C. business magazine.¹²⁴ The story dealt with details of Wolf's business dealings that he wanted kept private.¹²⁵ An appellate court affirmed summary judgment against Wolf, finding that public records such as the tax

115. *Jacova*, 83 So. 2d at 37 (emphasis added) (citing *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 489 (N.Y. 1952) (holding that broadcast of the plaintiff's animal act at halftime of pro football game was part of entire public sporting event and, thus, was not invasion of privacy)).

116. *Id.* at 40.

117. *Barker v. Richmond Newspapers, Inc.*, 14 Va. Cir. 421 (Cir. Ct. 1973).

118. *Id.* at 425. The court found Barker was an involuntary public figure. *Id.* at 424.

119. *Id.* at 425.

120. *Poteet v. Roswell Daily Record, Inc.*, 584 P.2d 1310, 1311 (N.M. Ct. App. 1978).

121. *Id.*

122. *Id.* at 1313.

123. 553 A.2d 1213 (D.C. 1989).

124. *Id.* at 1215.

125. *Id.*

ledgers, court files, and government records research in gathering information for the story provided a shield for the press.¹²⁶

Likewise, six members of the University of Maryland basketball team sued a local newspaper after it ran a story in November 1977 about the youths either being placed on academic probation or recently being removed from it.¹²⁷ The appellate court affirmed summary judgment for the newspaper, holding the basketball program and its players' scholastic status "was of significant public interest and concern,"¹²⁸ and that since the players had "sought and basked in the limelight, . . . [they] will not be heard to complain when the light focuses on their potentially imminent withdrawal from the team."¹²⁹

While many courts seem stingy with invasion of privacy claims by private individuals, other tribunals find room to reign in press actions. Strapped to a backboard in a medical transport helicopter, Ruth Shulman never thought her comment about wanting to die would be broadcast to the nation.¹³⁰ Her words, captured by a microphone worn by a nurse aboard the helicopter, along with footage captured by a camera operator on board the helicopter, aired on the television show *On Scene: Emergency Response*.¹³¹ Shulman sued for invasion of privacy, and the defense argued the accident happened on a public roadway and could be seen by anyone driving by.¹³² The Supreme Court of California found that the First Amendment protected the defendants in covering a news event within the public's view, even if the facts broadcast about Shulman were private.¹³³ But the court also concluded a jury should be able to decide whether Shulman reasonably could have expected her conversation with medical workers to be private.¹³⁴

Arguably, the last thing an injured accident victim should have to worry about while being pried from her wrecked car is that a television producer may be recording everything she says to medical personnel for the possible edification and entertainment of casual television viewers. . . . In short, the state may not intrude into the

126. *Id.* at 1221.

127. *Bilney v. Evening Star Newspaper Co.*, 406 A.2d 652, 654 (Md. Ct. Spec. App. 1979).

128. *Id.*

129. *Id.* at 660.

130. *Shulman v. Group W Prod., Inc.*, 955 P.2d 469, 476 (Cal. 1998).

131. *Id.* at 475.

132. *Id.* at 477.

133. *Id.* at 497.

134. *Id.* at 491.

proper sphere of the news media to dictate what they should publish and broadcast, but neither may the media play tyrant to the people by unlawfully spying on them in the name of newsgathering.¹³⁵

Here, this court seemed torn in trying to play the balancing act—not wanting to disturb First Amendment privileges but still seeing a need to protect people from an almost incomprehensible form of intrusion.

Another rude invasion came early one morning at the Maryland home of Charles Wilson. Wilson and his wife were in bed when police entered their home looking to serve a warrant on the couple's son.¹³⁶ A *Washington Post* reporter and photographer were riding along with police and, though the Wilson's son was not home, the photographer did snap a shot of Wilson clad only in his underwear with an officer's gun pointed at his head.¹³⁷ The United States Supreme Court found that media "ride-alongs," long a publicity vehicle for police departments, violated privacy rights protected by the Constitution's Fourth Amendment.¹³⁸ Wilson's victory was moral not monetary, as the high court affirmed the Fourth Circuit's dismissal of the suit because the law was unclear, at the time of the raid, as to whether police ride-alongs were violative of the Fourth Amendment.¹³⁹

In another invasion case, felon Arnold Huskey sued NBC for invasion of privacy after the network filmed him without his permission in the exercise yard of the penitentiary in Marion, Illinois.¹⁴⁰ The network contended that Huskey, as a prisoner, was a limited-purpose public figure who lost all rights to privacy while incarcerated, and that he was in a publicly visible area when recorded.¹⁴¹ The district court, in finding that Huskey's conviction and imprisonment were matters of public interest, ruled that his time in prison and the prison itself were not.¹⁴²

The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a mor-

135. *Shulman*, 955 P.2d at 494, 497. Specifically, the court held that summary judgment in favor of the defense on Shulman's intrusion claim was proper, and allowed her to proceed on the publication of private facts claim. *Id.* at 497.

136. *Wilson v. Layne*, 526 U.S. 603, 607 (1999).

137. *Id.* The photograph never ran in the newspaper. *Id.* at 608.

138. *Id.* at 614 (citing U.S. CONST. amend. IV).

139. *Id.* at 614–15.

140. *Huskey v. NBC*, 632 F. Supp. 1282, 1285 (N.D. Ill. 1986).

141. *Id.* at 1286.

142. *Id.* at 1292.

bid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.¹⁴³

Here, the court appeared to merge a reasonable-man standard, along with the mention of decency when finding for Huskey.¹⁴⁴

V. THE PRESS PRESSES ON INTO THE FUTURE

With lawsuits coming fast and furious, and costing exorbitant amounts of money to defend, the press faces possibly its biggest challenge yet: trying to curb civil actions against it while struggling to retain all of the privileges the First Amendment affords.¹⁴⁵ The press may actually be fighting itself when it comes to this. "We had a lot of debate inside the paper about this," Dick Rogers, the *San Francisco Examiner's* metro editor, was quoted as saying four years ago.¹⁴⁶ "And I don't have a glib answer for when you do and when you don't write a story about a person pushed into the public eye."¹⁴⁷ The answer to the press's dilemma may be self-policing and self-restraint, some press experts say. "There is a real primal aspect to privacy,"¹⁴⁸ Ellen Alderman, co-author of two privacy books, said. "And I think the public expects the press to draw a line somewhere, even where the law doesn't."¹⁴⁹

The question still exists: how far can the press go? Some say as far as is necessary to inform the public. "What right do we have, in the purest sense, not telling people something?" asked Kathy Pellegrino, recruitment editor for the *Sun-Sentinel* in Fort Lauderdale, Florida. "It becomes a balancing test. Not so much a legal question, but is it the right thing to do?"¹⁵⁰

143. *Id.* at 1288. The court denied NBC's motion to dismiss for failing to state a proper cause of action. *Id.* at 1296.

144. *Huskey*, 632 F. Supp. at 1288.

145. See generally Walsh et al., *supra* note 4; Sguera, *supra* note 12.

146. Kenneth Howe, *A Delicate Balancing Act*, S.F. CHRON., Apr. 15, 1999, at A1.

147. *Id.*

148. *Id.*

149. *Id.*

150. Kathy Pellegrino, Goodwin Seminar Speech, Shepard Broad Law Center, Nova Southeastern University, Ft. Lauderdale, Fla. (Jan. 24, 2002).

The solutions include self-censorship and industry ethics guidelines.¹⁵¹ The guidelines pose a problem, and some say they will backfire, leading to litigation by individuals using the new policies against the press.¹⁵²

VI. CONCLUSION

Courts increasingly walk a narrow line in refereeing the age-old battle between freedom *of* the press and freedom *from* the press, as media outlets push the envelope with new technology, new competition, and new topics on which to report. The world is so different today than it was more than a century ago when Warren and Brandeis penned their right to privacy article. There is more news, more information, and more people who yearn, demand, need, and require that news function in an open and free society. The press plays a vital role in the free-flow of information and must continue to do so, even when it damages the lives of private citizens. To be sure, there remain some areas that must be off limits to publicity. For example, the details of the life of a citizen not involved in a general news event, where no greater good for society lies in publishing the information, ought to remain protected. But this exclusionary category shrinks each day. Additionally, this country's foundation of free speech and free press can never be usurped—not even by the right to privacy.

As the press furrows out fresh news stories for its readers, the subjects of those news accounts become increasingly more litigious. Courts sometimes make matters worse with their broad interpretation of “newsworthiness” and shifting definitions of “limited” or “voluntary” public figures. Ultimately, the burden of curbing privacy invasions must rest with the press itself, as courts will be and should be unwilling to eviscerate the First Amendment to save the thin skin of those who end up, through no fault of their own, in newsworthy events. This creates a stalemate in the clash between the right to privacy and the right to know.

We must leave the press to police itself—to do the right thing—to be, as Warren and Brandeis said of the right to privacy, “elastic.”¹⁵³ And when, as they theorized in 1890, the press oversteps its bounds, we can rely on the public, the very entity by which the press survives, to rebel and force the press back in line.

151. Howe, *supra* note 146.

152. *Id.* (quoting Jane Kirtley, executive director of The Reporters Committee for Freedom of the Press).

153. Warren & Brandeis, *supra* note 3, at 215.

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It has been that way for more than 100 years and it will continue in that vein for centuries to come. People choose to live in the “land of the free.” Inherent in that choice is the acceptance of a reduced level of privacy, one needed for the greater good of society.

When Time Stands Still: An Argument for Restoring Public Figures to Private Status

Olympia R. Duhart*

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I. INTRODUCTION

He never had a chance. William James Sidis was too shy, too introverted, and far too withdrawn to ever survive the barrage of publicity that surrounded him because of his preternatural mathematical skills.¹ The brilliant scholar, who had lectured to mathematicians on the topic of four-dimensional bodies at the age of eleven, and graduated Harvard at the age of sixteen,² could not cope with the media attention that tracked his academic success. Within time, the bright light of media glitz proved too brilliant, indeed. The one-time child prodigy—who suffered a nervous break-down from the unwanted attention—abandoned his intellectual pursuits in favor of

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1. See *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806 (2d Cir. 1940).

2. *Id.* at 807.

a more private role in society and “cloaked himself in obscurity.”³ Quite deliberately, Sidis receded from the public eye; he carefully carved out a private place for himself free from the press and free of the public scrutiny.⁴

But the retreat would not last forever. More than twenty-five years after Sidis sought the solace of quietude, he found himself again a subject of inquiry.⁵ Although Sidis had lived quietly for some time, a visit from a reporter transformed his life and highlighted an unusual time warp in the field of media law—one that would persist for years.

The case, denied a writ of certiorari by the United States Supreme Court in 1940,⁶ set the stage for the “permanent public figure.” Surprisingly, a barrage of cases that deal with public figures in various contexts have done little over the past sixty years to change the problems raised by retention of public figure status. One who has achieved public figure status finds it nearly impossible to shed. More importantly, the retention of public figure status presents incredible hurdles for defamation and privacy plaintiffs.⁷ This article will present a test for restoring one-time public figures to private status. Because of the need to restore the privacy rights of citizens and provide them with a shield against defamation, courts should adopt a new test to reinstate the private status of one-time public figures. Most importantly, courts should inject an element that allows for the passage of time into the public figure abatement analysis.

Part two of this article will provide a background of public figure law; it will discuss some of the legal hurdles presented by the *New York Times v. Sullivan* standard and the added dimensions it presents for public figures attempting to bring an invasion of privacy or a defamation suit. In Part three, this article will examine some representative cases that depict the problems faced by permanent public figures. Part four will propose a test for

3. *Id.* at 809. Sidis is not the only intellectual great to shun the public eye. “Many great scientists and philosophers, among them René Descartes, Ludwig Wittgenstein, Immanuel Kant, Thorstein Veblen, Isaac Newton, and Albert Einstein, have had . . . solitary personalities.” SYLVIA NASAR, *A BEAUTIFUL MIND* 15 (1998).

4. *Sidis*, 113 F.2d at 809. In fact, the article in question discusses Sidis’ attempt to live a private life. The piece follows his attempts to conceal his identity as a clerk whose job requires nothing extraordinary in the way of intellectual capabilities. *Id.* at 807.

5. The original celebrity surrounded Sidis’ mathematical skills reached a peak in 1910. *Id.* On August 14, 1937, *The New Yorker*, a weekly magazine, portrayed Sidis in a biographical sketch and cartoon. *Id.* The court referred to the 1937 article on Sidis as a “ruthless exposure” of its subject. *Id.*

6. *Sidis v. F-R Publ’g Corp.*, 311 U.S. 711 (1940).

7. Carol Anne Been, Note, *Public Status Over Time: A Single Approach to the Retention Problem in Defamation and Privacy Law*, 1982 U. ILL. L. REV. 951, 966 (1982).

restoring the private status of public figures who seek to bring an action for invasion of privacy or defamation. Finally, this article will conclude with a discussion of why a test for restoring private status is needed today.

II. PUBLIC FIGURES AND THE LAW

A. New York Times Co. v. Sullivan

The history of public figures and the law begins with an analysis of the landmark case *New York Times Co. v. Sullivan*.⁸ The case, a 1964 decision, set the framework for the media law unique to public officials and, subsequently, public figures. The *New York Times* case was sparked by a newspaper advertisement entitled "Heed Their Rising Voices," which called attention to civil rights violations in the South.⁹ Although the plaintiff was not named in the advertisement, he brought suit for defamation against the *New York Times*.¹⁰ L.B. Sullivan, who was one of three elected commissioners of the City of Montgomery, Alabama, claimed that the word "police" referred to him as the Montgomery Commissioner who supervised the police department.¹¹ One of the paragraphs that served as a basis for Sullivan's claim is as follows:

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*¹²

8. 376 U.S. 254 (1964).

9. *Id.* at 256.

10. *Id.* The plaintiffs sought a total of \$5,600,000. Kermit L. Hall, *Justice Brennan and Cultural History: New York Times v. Sullivan and Its Times*, 27 CAL. W. L. REV. 339, 351 n.67 (1991).

11. *New York Times*, 376 U.S. at 258. Sullivan was one of many state officials who played a prominent role in breaking the strides of the civil rights movement of the 1960s. He decided to disrupt the sit-in movement through force and intimidation. Hall, *supra* note 10, at 348. In one alarming example, state and city police stood by while "baseball wielding Klansman waded into a group of some 800 black students from Alabama State University supporting a sit-in at the restaurant in the state capitol." *Id.*

12. *New York Times*, 376 U.S. at 257–58.

The Court noted from the onset that it was “uncontroverted that some of the statements” were inaccurate.¹³ However, the Court was prompted by weighty policy concerns in its landmark ruling. The Court acknowledged the need for uninhibited debate that sometimes included “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁴ Rather than strip journalists of their ability to criticize the government anytime the ensuing reports contained false or defamatory statements, the Court imposed a new standard by which to judge defamatory statements aimed at public officials.

Prior to the milestone decision handed-down in *New York Times*, “[l]ibel in America was recognized as a strict liability tort.”¹⁵ In *New York Times*, however, the United States Supreme Court decided that the national interest in promoting robust debate on public issues warranted extra protection for journalists when their subjects were public officials. Accordingly, the *New York Times* Court made significant strides in the effort to protect free “speech critical of the government and government officials.”¹⁶ Under *New York Times*, a public official would have to show with “‘convincing clarity’ that the [newspaper] acted with ‘actual malice’ in publishing [a] false, defamatory statement.”¹⁷

The term “actual malice” was defined by the Court as: 1) knowledge by the defendant that the statement was false; or 2) the defendant’s reckless disregard for the statement’s falsity.¹⁸ Simple negligence in journalism—even that which resulted in false statements—would not support a defamation suit brought by a public official.¹⁹ With such a high burden, “the Court made it extremely difficult if not impossible for such officials to prevail in libel actions against media defendants.”²⁰

13. *Id.* at 258. The inaccuracies, however, were limited to mistakes in the details of the injustices King had suffered at the hands of Southern leaders. *Id.* For instance, one part of the advertisement referred to a song black students sang on the state capitol steps during a demonstration. *Id.* The advertisement identified the song as “My Country, ’Tis of Thee” when the students actually sang the National Anthem. *Id.* at 258–59. In another error, the advertisement referred to Dr. King’s seven arrests at the hands of the southern police; in fact, he had been arrested four times. *New York Times*, 376 U.S. at 259.

14. *Id.* at 270.

15. Elsa Ransom, *The Ex-Public Figure: A Libel Plaintiff Without Class*, 5 SETON HALL J. SPORT L. 389, 391 (1995).

16. *Id.* at 391.

17. *Id.*

18. *New York Times*, 376 U.S. at 280.

19. *Id.* at 288.

20. Ransom, *supra* note 15, at 391.

Other policy considerations propelling the *New York Times* decision included the fear of self-censorship among media and the recognition of the legitimate public interest in the dealings of public officials. Other commentators have noted the political motives of the *New York Times* decision:

Sullivan was a remarkable incident in modern American cultural history, an understanding of which reveals how conflicting social demands shaped and in turn were shaped by first amendment law. Historians and legal scholars have regularly insisted that *Sullivan* compels our attention because of its connection to the civil rights movement of the 1960s. *Sullivan*, in this view, was a necessary step in the legal confirmation of the civil rights movement, one that shielded its leadership from exposure to the constraining effects of state-administered common law rules of political libel. The white public officials of the South that brought *Sullivan* and other libel actions, according to this literature, were provincial racists, who hypocritically complemented the force and violence they used against the movement with a cynical invocation of the law's sweet reason. From this perspective, Justice Brennan wisely collapsed traditional lines of constitutional understanding in the face of massive, pent-up demands for racial equality.²¹

Whatever the motivation behind its origins, the impact of the *New York Times v. Sullivan* case immediately started a long-running debate on its need, and, eventually, its efficacy. One set of scholars celebrated the decision, calling it "an occasion for dancing in the streets."²² Proponents of the *New York Times* decision believed the Court's ruling evinced its commitment to both the First Amendment and the principles of democracy that are central to America's promise.²³ Others, however, asserted that the *New York Times* test is so stringent that it actually invites journalistic misconduct, much to the detriment of the society it aims to protect. The standard advanced in *New York Times* "may so expose public officials to journalistic abuse that it

21. Hall, *supra* note 10, at 341–42 (citations omitted).

22. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (1964) (quoting Mr. Alexander Meiklejohn).

23. *Id.* "The theory of the freedom of speech clause was put right side up for the first time." *Id.* at 208.

will drive capable persons away from government service, thus frustrating, rather than furthering, the political process.”²⁴

Still, others praised the spirit of *New York Times* but criticized its limits. Any number of cases have shown how very far courts are willing to go without finding “reckless disregard.” Just four years after *New York Times*, the United States Supreme Court found that failure to investigate or seek any corroboration before publishing an allegation does not rise to the level of reckless disregard for the truth.²⁵ Another case, *Masson v. New Yorker Magazine, Inc.*,²⁶ examined the effect deliberate alteration of quotes would have on libel action. Surprisingly, the Court ruled that the First Amendment protects deliberate alteration of quotes unless the plaintiff can prove that the change results in a “material” change of the speaker’s meaning.²⁷

Also, in *Harte-Hanks Communications, Inc. v. Connaughton*,²⁸ the United States Supreme Court found that failure to comply with professional standards in publication of a falsehood was insufficient to support a finding of “actual malice.”²⁹ Indeed, it seemed the “actual malice” standard would create serious problems for a public official attempting a libel suit. In a short time, however, the class would be expanded.

B. Expanding New York Times

Just three years after the decision announced in *New York Times*, the United States Supreme Court examined two cases that involved the application of the *New York Times* standard to public figures. *Curtis Publishing Co. v. Butts*³⁰ involved a controversy surrounding a head football coach for a university.³¹ Butts was not truly the kind of public figure or

24. GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 139 (1999). See also Richard Epstein, *Was New York Times v. Sullivan Wrong?* 53 U. CHI. L. REV. 782 (1986). “On balance, the common law rules of defamation (sensibly controlled on the question of damages) represent a better reconciliation of the dual claims of freedom of speech and the protection of individual reputation than does *New York Times* rule that has replaced it.” *Id.* at 817.

25. *St. Amant v. Thompson*, 390 U.S. 727, 732–33 (1968).

26. 501 U.S. 496 (1991).

27. *Id.* at 497.

28. 491 U.S. 657 (1989).

29. *Id.*

30. 388 U.S. 130 (1967).

31. *Id.*

official contemplated by the Court in *New York Times*.³² Yet, he had achieved national fame as a football coach.³³ Butts filed a libel suit against Curtis Publishing Company, publisher of the *Saturday Evening Post*, for an article falsely accusing him of conspiring to “fix” a football game between the University of Georgia and the University of Alabama.³⁴ Butts sought \$5,000,000 compensatory and \$5,000,000 punitive damages.³⁵

The companion case to *Curtis Publishing Co., Associated Press v. Walker*,³⁶ concerned a libel claim brought by a man accused of inciting a riot against federal marshals.³⁷ The plaintiff, who was a national military figure with his own following, the “Friends of Walker,” was still not deemed a public official at the time the false news dispatch was released about him.³⁸ According to the dispatch, Walker led opposition to federal efforts to enforce court ordered desegregation at the University of Mississippi.³⁹

32. At the time the article about him was written, Butts was athletic director of the University of Georgia, which is a state university. *Id.* at 135. However, he was employed by the Georgia Athletic Association, a private corporation. *Id.* One case that had attempted to define the “public figure” was *Rosenblatt v. Baer*, 383 U.S. 75 (1966). In *Rosenblatt*, the United States Supreme Court held that the public figure status “applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Id.* at 85.

33. *Curtis Publ'g*, 388 U.S. at 136.

34. *Id.* “The article was entitled ‘The Story of a College Football Fix’ and prefaced by a note from the editors stating: ‘Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one’” *Id.*

35. *Id.* at 137. “The jury returned a verdict for \$60,000 in general damages and for \$3,000,000 in punitive damages.” *Id.* at 138. “The trial court reduced the total to \$460,000 by remittitur.” *Id.*

36. 388 U.S. 130, 140 (1967). The United States Supreme Court combined the *Curtis* and *Associated Press* cases and issued one opinion.

37. *Id.*

[The case] arose out of the distribution of a news dispatch giving an eyewitness account of events on the campus of the University of Mississippi on the night of September 30, 1962, when a massive riot erupted because of federal efforts to enforce a court decree ordering the enrollment of a Negro, James Meredith, as a student in the University. The dispatch stated that respondent Walker, who was present on the campus, had taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the court's decree and to assist in preserving order. It also described Walker as encouraging rioters to use violence and giving them technical advice on combating the effects of tear gas.

Id. at 140.

38. *Id.*

39. *Id.*

Walker sued the Associated Press for libel, claiming the report was false.⁴⁰ In its decisions, the United States Supreme Court expanded the *New York Times v. Sullivan* standard for public officials to include public figures.⁴¹ Chief Justice Warren noted in his concurring opinion that the distinctions between governmental and private sectors are increasingly blurred.⁴²

In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Viewed in this context, then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society.⁴³

To be sure, the announcements in the *Curtis Publishing Co.* and *Associated Press* opinions would have far-reaching effects. They would make significant legal distinctions. "A private person and a public figure have different relationship in libel. The latitude for journalism is larger in the latter category."⁴⁴ The decisions also opened the door for a host of public figure classifications. Courts were no longer forced to confine the higher "actual malice" standard to public officials; now, the standard

40. *Id.* at 140.

41. *Curtis Publ'g*, 388 U.S. at 155.

42. Warren reflected: "To me, differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy." *Id.* at 163 (Warren, J., concurring). Even Warren was probably unable to imagine how very blurred those lines would have become in 2002. Today, public figures and public officials are nearly impossible to distinguish. With presidential candidates routinely appearing on late-night entertainment shows, it seems there is almost no difference at all between officials and celebrities.

43. *Id.* at 163-64.

44. JOHN MURRAY, *THE MEDIA LAW DICTIONARY* 83 (1978).

extended to public figures as well.⁴⁵ Still, the Court needed to address a critical question: What made one a public figure?⁴⁶

C. Who is a Public Figure?

The Supreme Court had the opportunity to explore this issue in the case *Gertz v. Robert Welch, Inc.*⁴⁷ The case involved a prominent Chicago attorney, Elmer Gertz, who was hired to represent the family of a man shot and killed by a policeman.⁴⁸ Gertz's role in the civil suit against the police officer prompted an article in the *American Opinion*, which "accused Gertz of being the architect of a 'frame-up' of [policeman] Nuccio and stated that Gertz had a criminal record and longstanding communist affiliation."⁴⁹ Gertz sued for libel.⁵⁰

In examining the dispute, the United States Supreme Court was afforded the opportunity to clarify the definition of "public figure." The Court identified two attributes of public figure status. First, the Court noted the public figure's access to the channels of communications.⁵¹ According to the majority opinion written by Justice Powell: "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."⁵²

The second attribute of a public figure cited by the *Gertz* Court was the fact that a public figure is one "who has assumed a role of special promi-

45. *Curtis Publ'g*, 388 U.S. at 164.

46. The question has generated conflicting opinions from courts and scores of critical commentary from legal scholars. One commentator noted that "[t]he hard problem of line-drawing is how to define and treat those who are more than private persons but less than official: public figures. The question may well be unanswerable by any formula." Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to the "Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 622 (1983).

47. 418 U.S. 323 (1974).

48. *Id.* at 325. Gertz was one of the most popular attorneys in his day. For example, one of his former clients was Jack Ruby. Ernest D. Giglio, *Unwanted Publicity, the News Media, and the Constitution: Where Privacy Rights Compete with the First Amendment*, 12 AKRON L. REV. 229, 238 (1978).

49. Stone, *supra* note 24, at 143.

50. *Id.* After a jury trial, Gertz won a \$50,000 judgment. The trial court, however, entered a judgment n.o.v. based on its application of the *New York Times v. Sullivan* standard to anyone embroiled in a discussion of a public issue. *Id.* The court of appeals affirmed, but the United States Supreme Court reversed. *Id.*

51. *Gertz*, 418 U.S. at 344.

52. *Id.* at 345.

nence in society and thus invites public scrutiny and the accompanying risks.”⁵³ As Justice Powell expressed:

An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties Those classified as public figures stand in a similar position.⁵⁴

Applying its newly announced test for a public figure to Gertz, the Court held the prominent attorney to be a private person for the purposes of the *New York Times v. Sullivan* standard.⁵⁵

Subsequent cases attempted to inject other factors into the public figure status determination: the controversy involved and the plaintiff's role in the dispute. In *Time, Inc. v. Firestone*⁵⁶ and *Wolston v. Reader's Digest Ass'n*,⁵⁷ respectively, the Supreme Court addressed these issues. In *Time*, the Court rejected the public status of the plaintiff, applying the controversy standard.⁵⁸ The Court held that the dissolution of a marriage was not the type of “public controversy” contemplated by the *Gertz* Court.⁵⁹ The plaintiff, therefore, would not be deemed a public figure because of her lack of involvement in a public controversy. The *Wolston* case limited the public figure status by the plaintiff's role in the controversy.⁶⁰ The plaintiff in

53. Been, *supra* note 7, at 955.

54. *Gertz*, 418 U.S. at 344–45.

55. *Id.* at 352. According to the Court's analysis, Gertz failed both prongs of the test. He did not discuss the case with the media, and therefore lacked access to the press to rebut claims. Been, *supra* note 7, at 955. Also, “because Gertz had merely represented a client, he had not invited the risks associated with close public scrutiny.” *Id.*

56. 424 U.S. 448 (1976).

57. 443 U.S. 157 (1979).

58. *Time*, 424 U.S. at 453.

59. *Id.* at 454. The *Time* case involved a divorce between a member of a socially prominent family and Russell Firestone, a member of one of America's wealthiest families. *Id.* at 450. “Time magazine erroneously reported that the divorce was granted on the grounds of adultery.” Stone, *supra* note 24, at 149. Mrs. Firestone sued the magazine for libel. *Id.* Part of the final judgment alluded to the wild allegations that surfaced during the divorce: “According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl.” *Time*, 424 U.S. at 450.

60. Been, *supra* note 7, at 957. *Wolston* involved a plaintiff who was convicted of contempt in the late 1950s for his refusal to appear before a grand jury investigating Soviet espionage. Stone, *supra* note 24, at 149. The case was highly publicized at the time.

Wolston prevailed in his libel suit against the defendant because he had not willingly engaged the attention of the public.⁶¹

Commentators have advanced the same test. In a recent lecture, Professor Rodney Smolla posed the question: “How do we know when we are dealing with a public figure or a private person?”⁶² His answer: “Have they voluntarily injected themselves into a public controversy?”⁶³

Taken together, then, the factors considered by the United States Supreme Court in conferring public figure status upon individuals include: 1) plaintiff’s access to the media; 2) assumption of a special role in the public eye; 3) the plaintiff’s involvement in a “public controversy”; and 4) the plaintiff’s role in the controversy. While these guidelines may prove helpful in determining who constitutes a public figure, they are not at all useful under the abatement issue. Even if one meets the public figure status—and summarily triggers the difficult hurdles presented by the *New York Times v. Sullivan* standard—when can one retreat into a private legal status?

The answer to this question has proven elusive. Unfortunately, however, it is one that often emerges in both defamation and privacy cases.⁶⁴

“Sixteen years later, the defendant published a book erroneously identifying plaintiff as a Soviet agent.” *Id.*

61. See *Wolston*, 443 U.S. at 157. The Court’s decision in *Wolston* was based on its refusal to classify the plaintiff as a public figure. Therefore, it never had to reach the question of whether the passage of time (sixteen years here) would make *Wolston* a private plaintiff. In their concurring opinion, however, Justices Blackmun and Marshall argued that even if the plaintiff gained public figure status at the time of the espionage charges, sixteen years of anonymity would restore him to private status. *Id.* at 171 (Blackmun, J., concurring). Blackmun stated that the time lapse between *Wolston*’s participation in the controversy and the magazine’s defamatory reference “was sufficient to erase whatever public-figure attributes” *Wolston* once possessed. *Id.* (Blackmun, J., concurring).

62. Rodney Smolla, Goodwin Seminar Speech, Shepard Broad Law Center, Nova Southeastern University in Ft. Lauderdale, Fla. (Jan. 17, 2002). Smolla is a member of the law faculty at the University of Richmond, and the author of numerous books on Free Speech and First Amendment issues.

63. *Id.*

64. Although the *New York Times* case involved defamation, lower courts generally defer to the Supreme Court’s defamation test to “assess public figure status in privacy cases.” Been, *supra* note 7, at 963. The law of privacy has had to rely heavily on judge-made law. In fact, privacy law in this country originated in the seminal article written by Samuel Warren and Louis Brandeis. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The American Law Institute did not officially recognize the tort of public disclosure of private fact as one of the four types of invasion of privacy torts until 1976. Phillip E. DeLaTorre, *Resurrecting A Sunken Ship: An Analysis of Current Judicial Attitudes Toward Public Disclosure Claims*, 38 SW. L.J. 1151, 1151 (1985). See also RESTATEMENT (SECOND) OF TORTS § 652A (2002).

"While the [defamation and invasion of privacy] torts do address different individual interests, the reputational and personal integrity concerns in both causes of action are of equivalent value in the balance against free speech guarantees."⁶⁵ Several cases highlight the need for a new test that factors in the passage of time and allows public figures to retreat in time to privacy. Moreover, the "Supreme Court has expressly reserved the question of whether the passage of time can extinguish an individual's status as a public figure."⁶⁶

III. REPRESENTATIVE CASES

A. Brewer v. Memphis Publishing Co.

Many cases demonstrate the need for a new approach to the public figure abatement problem. The case of *Brewer v. Memphis Publishing Co.*⁶⁷ is one such case. In *Brewer*, plaintiff Anita Wood Brewer filed a defamation suit based on a newspaper article that ran about her and Elvis Presley in the *The Commercial Appeal*, a Memphis newspaper.⁶⁸ The article, which ran in a *People* column on September 8, 1972, inferred that Brewer and Presley were rekindling an old, romantic relationship.⁶⁹ The article read:

FLICKERING FLAME: Back in 1957 Anita Wood, who came from Jackson, Tenn., to Memphis to sing on TV, was Elvis Presley's "No. 1 girl." This week as Elvis closed his month-long show at the Las Vegas Hilton, Miss Wood stopped by the hotel for what appeared to be a "reunion" of two old friends. Elvis recently filed for divorce from his wife of five years, Priscilla. Miss Wood is divorced from former Ole Miss football star Johnny Brewer.⁷⁰

After John Brewer contacted the newspaper, the paper ran a correction stating that Anita Brewer was not in Las Vegas on the date in question, nor was she divorced from John Brewer.⁷¹ The Brewers brought separate

65. Been, *supra* note 7, at 966.

66. Robert M. Dato, Comment, *The Effect of Passage of Time on the Status of Inactive Public Figures*, 35 FED. COMM. L.J. 235, 242 (1983).

67. 626 F.2d 1238 (5th Cir. 1980).

68. *Id.* at 1240.

69. *Id.*

70. *Id.* Accompanying the article was a photograph of Wood. *Id.*

71. *Id.*

defamation actions against Memphis Publishing Company, and the suits were consolidated.⁷²

By the time the case reached the Fifth Circuit Court of Appeals, the initial issue was whether Anita Brewer or John Brewer were public figures.⁷³

The court made the determination that both Anita and John Brewer were public figures.⁷⁴ It based its decision on the fact that Anita Brewer, in the early to mid-1950s, won talent and beauty contests and worked as a disc jockey with a radio station in Jackson, Tennessee.⁷⁵ The court also noted that Anita Brewer had been awarded a motion picture contract, though she had never done a movie.⁷⁶ In addition, she had appeared on national television, once on the *Jack Paar Tonight Show* and about five times on the *Andy Williams Show*, as a singer.⁷⁷ More important to the content of the article in question, Anita Brewer had dated Elvis Presley for about five or six years, from 1955 to 1960 or 1961.⁷⁸ The court also made note of the fact that after Anita Brewer's marriage to John Brewer in 1964, she did not seek media attention or continue as a professional entertainer.⁷⁹

The court assessed John Brewer's status as a public figure through both his football career and his marriage to Anita Brewer.⁸⁰ "John Brewer was a member of the Ole Miss football team the year it was ranked number one in the nation."⁸¹ He also played professional football from 1960 to 1970, first with the Cleveland Browns, then with the New Orleans Saints.⁸² The court also pointed out that John Brewer may have achieved public figure status through his marriage to Anita Brewer.⁸³

72. *Brewer*, 626 F.2d. at 1240–41. In 1974, a jury found for the Brewers and awarded each \$400,000. *Id.* The judge granted a new trial on damages alone and the second jury awarded Anita Brewer \$250,000 and John Brewer \$150,000; they accepted a remittitur to \$100,000 and \$50,000 respectively. *Id.*

73. *Id.* at 1241.

74. *Id.* at 1255.

75. *Id.* at 1248. Anita Brewer once did the "Antics of Anita" radio show. *Id.*

76. *Brewer*, 626 F.2d at 1248.

77. *Id.*

78. *Id.*

79. *Id.* There was possibly one exception of a television/newspaper interview shortly after her marriage. *Id.*

80. *See Brewer*, 626 F.2d at 1255.

81. *Id.* at 1248.

82. *Id.* "In a published interview he was quoted as saying that his football career had made his name well-known enough to open business opportunities for him the rest of his life" *Id.*

83. *Id.* at 1249 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

The Brewers maintained that they were neither all-purpose public figures nor limited public figures.⁸⁴ They asserted that neither one of them had “‘assume[d] special prominence in the resolution of public questions.’”⁸⁵ The Fifth Circuit rejected the argument and found that, under *Gertz*, the Brewers were public figures.⁸⁶ Therefore, they could only win in their defamation claim by proving the “actual malice” standards advanced in *New York Times*.⁸⁷ As for Anita Brewer’s deliberate retreat from the media, the court held that “even viewing Anita as one who had retreated several years before this article, she would be required to prove malice in her suit based on this article.”⁸⁸

B. *Friedan v. Friedan*

The case of *Friedan v. Friedan*⁸⁹ offers a unique view of the public figure-status retention issue. In this case, the Southern District of New York considered whether one can retroactively be deemed a public figure through his or her connection to one who later emerged as a public figure.⁹⁰ *Friedan* involved a suit between plaintiff Carl Friedan and his former wife, Betty Friedan, a well-known leader of the feminist movement.⁹¹ The lawsuit was the result of an article written by Betty Friedan, which ran in *New York* magazine.⁹² The magazine issue featuring the Friedan article was part of a special issue dedicated to “a twenty-five year throwback to the year 1949.”⁹³

84. *Id.*

85. *Brewer*, 626 F.2d at 1249 (alteration in original) (quoting *Gertz*, 418 U.S. at 351).

86. *Id.* at 1255.

87. *Id.*

88. *Id.* at 1257. The court seemed to hinge its decision on the fact that some of the same issues that gave rise to Anita Brewer’s classification as a public figure—her romantic involvement with Elvis Presley—was the subject of the article. *Id.*

89. 414 F. Supp. 77 (S.D.N.Y. 1976).

90. *Id.*

91. *Id.* Betty Friedan is widely recognized as America’s feminist leader. Her book *The Feminine Mystique* (1963) challenged several long-established American attitudes. Betty Friedan also founded the National Organization for Women in 1966. *Betty Naomi Friedan*, in Microsoft Encarta Online Encyclopedia 2002, at <http://encarta.msn.com/encnet/refpages/RefArticle.asp> (last visited Oct. 23, 2002).

92. *Friedan*, 414 F. Supp. at 78. In addition to suing his ex-wife, Carl Friedan also sought recovery of damages from *New York* magazine and three broadcasting companies for using the magazine in spot commercials on their television channels promoting the article. *Id.*

93. *Id.* The magazine’s retrospective was themed “The Year We Entered Modern Times.” *Id.*

The article aimed to present the contrasting lifestyles of Ms. Friedan, who was a connubial housewife in the 1940s.⁹⁴

The article was illustrated with a photograph of Betty Friedan, her then husband, Carl, and their son in 1949.⁹⁵ Carl Friedan brought suit under the Civil Rights Law of New York, the statute that protected privacy rights.⁹⁶ Carl Friedan argued that he had made “every effort” to disassociate himself from his former wife’s public status to preserve his identity as a private individual.⁹⁷ However, the Southern District of New York held that the article—and the accompanying picture—describing Ms. Friedan’s life twenty-five years before her emergence as a feminist leader was held to be a matter of public interest.⁹⁸ First, the court noted from the onset that the defendant, Betty Friedan, as a leader of the feminist movement, was a public figure.⁹⁹ The court held: “All incidents of her life, including those which contrast with her present status and views, are significant in terms of the interest of the public in news.”¹⁰⁰

The court then went an additional step and held that her life experiences twenty-five years ago—before Betty Friedan herself achieved public-figure status—was also a matter of public concern.¹⁰¹ Finally, the court concluded by citing *Sidis v. F-R Publishing Corp.*,¹⁰² and noted that Carl Friedan’s privacy would have to be subordinated to the public interest in his former wife’s life. The court noted, “[e]veryone will agree that at some point the public interest in obtaining information becomes dominant over the individual’s desire for privacy.”¹⁰³ The court failed, however, to note a major distinction between the *Sidis* case and the facts in *Friedan*. In *Sidis*, the plaintiff was a public figure himself at one time. In *Friedan*, the plaintiff

94. *Id.* at 78–79. Betty Friedan has reflected many times on her slow entrance to the feminist movement. She said recently in an interview: “Looking at my own experience . . . when I was a graduate of Smith, the best women’s college in America, I knew nothing of feminism, I knew very little of the battle for women’s rights that took place in the last century and in the first half of this century.” Kathleen Erickson, *An Interview with Betty Friedan*, THE REGION, at <http://minneapolisfed.org/pubs/region/94-09/int949.cfm> (Sept. 1994).

95. *Friedan*, 414 F. Supp. at 78.

96. Carl Friedan brought suit against Betty Friedan under sections 50 and 51 of the Civil Rights Law of New York. *Id.* at 78.

97. *Id.* at 79.

98. *Id.*

99. *Id.* at 78.

100. *Friedan*, 414 F. Supp. at 78.

101. *Id.* at 79.

102. 113 F.2d 806 (2d Cir. 1940).

103. *Friedan*, 414 F. Supp. at 79 (quoting *Sidis*, 113 F.2d at 809)).

Carl Friedan was not a public figure at the time the picture of him was taken in 1949. Moreover, the court never did address the two decades that elapsed since Carl Friedan was married to the now-famous Betty Friedan.¹⁰⁴ With these failures, it is clear that the court's decision in *Friedan* is not based on solid analysis.

C. Bernstein v. NBC

In *Bernstein v. NBC*,¹⁰⁵ the District of Columbia considered a suit brought by a former death-row inmate who had been convicted of first-degree murder in 1933.¹⁰⁶ In 1933, plaintiff Charles S. Bernstein (under the name Charles Harris) was tried and convicted of first-degree murder and sentenced to death by electrocution.¹⁰⁷ Prompted by various people and committees working to aid Bernstein, reporter Martha Strayer, who worked for the *Washington Daily News*, worked to get the death sentence commuted to life imprisonment.¹⁰⁸ In 1935, Bernstein's death sentence was indeed commuted to life imprisonment.¹⁰⁹ Five years later, Bernstein received a conditional release from his life sentence.¹¹⁰ Finally, in 1945, Bernstein received a presidential pardon.¹¹¹

After his release from prison, Bernstein joined the public and attempted to live a normal life.¹¹² His efforts were destroyed in 1952, however, when the defendant, NBC, telecast, live, a program entitled "The Big Story."¹¹³ The story was a fictionalized dramatization based on Bernstein's conviction and pardon.¹¹⁴ Bernstein sued for invasion of privacy.¹¹⁵

104. The impact the passage of time should have on public status abatement will be discussed in further detail by the author. See *infra* pp. 13–15.

105. 129 F. Supp. 817 (D.D.C. 1955).

106. *Id.* at 818.

107. *Id.*

108. *Id.* at 818–19.

109. *Id.* at 819.

110. *Bernstein*, 129 F. Supp. at 819.

111. *Id.*

112. *Id.* Bernstein operated a "resort lodge." *Id.*

113. *Id.* The story was telecast over thirty-nine stations in its network. *Id.*

114. *Bernstein*, 129 F. Supp. at 819. Although the story was based on Bernstein, the names were changed. *Id.* at 820. Bernstein asserted, however, that the character playing him had a strong resemblance to the way he had appeared years earlier, and that the portrayal of him was "recognizable to him and to his friends and acquaintances" in the public. *Id.*

115. Bernstein sought \$250,000 in actual damages for mental pain and personal injury caused by the telecast. *Id.*

Although the defendant network asserted that the docudrama did change the name of the parties involved, Bernstein insisted that he was readily identifiable through the show.¹¹⁶ More importantly, he stressed that the passage of time between his release in 1940 and the show's airing in 1952 should restore his privacy rights.¹¹⁷ Was Bernstein still a public figure despite his efforts to avoid the press, or had he become "stale news?"¹¹⁸

As one commentator has noted, almost all individuals portrayed as major characters in a docudrama fall within the public figure or public official category.¹¹⁹ "After all, if the individual was not at least a limited public figure, why would the network produce the telefilm?"¹²⁰ Consequently, a plaintiff in a docudrama is almost always faced with the *New York Times v. Sullivan* standard.¹²¹ Certainly, the court in *Bernstein* agreed. While the District of Columbia discussed at length society's need to "sustain the unfortunate rather than tear him down,"¹²² the court still elected to find that Bernstein was not removed from the realm of public interest.¹²³ Therefore, the court held that any protection afforded by time "to a [former] public figure is not against repetition of the facts which are already public property."¹²⁴

D. A Closer Look at *Sidis*

The quintessential case for public figure abatement is *Sidis*. The case vividly highlights the inherent problems in the so-called permanent public

116. *Id.*

117. *Bernstein*, 129 F. Supp. at 824.

118. *See id.* at 835.

119. Jacqui Gold Grunfeld, *Docudramas: The Legality of Producing Fact-Based Dramas—What Every Producer's Attorney Should Know*, 14 HASTINGS COMM. & ENT. L.J. 483, 494 (1991).

120. *Id.*

121. *Id.* at 494–95.

122. *Bernstein*, 129 F. Supp. at 827. The *Bernstein* court also discussed in detail the "Red Kimono" case. *Id.* (construing *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931)). In *Melvin*, a reformed prostitute was tried and acquitted on a murder charge. After her acquittal, Gabrielle Darley "abandoned her life of shame," married, and "became entirely rehabilitated." *Melvin*, 297 P. at 91. More than five years later, defendant made and released a movie without Darley's consent. *Id.* "The Red Kimono" was based on Darley's past life. *Id.* Darley sued for invasion of privacy. *Id.* The *Melvin* case was one of the few that got it right—the court ruled that Darley's privacy had been invaded. *Id.* at 93–94.

123. *Bernstein*, 129 F. Supp. at 828.

124. *Id.*

figure status retention. The life of William James Sidis¹²⁵ was defined early by his father as a matter of public concern. The elder Sidis, an early psychotherapist, believed that “geniuses are made the way twigs are bent”¹²⁶ and worked hard to mold his child into a prodigy. He was also eager to show off his success to the public.¹²⁷

The effort was also aided by the natural genius of Sidis, who was said to have had an IQ between 250 and 300.¹²⁸ Sidis qualified for admission to Harvard University at age nine, but had to wait two years before he could enter as a special student.¹²⁹ The young Sidis was also fluent in five languages by age five, and could read Plato in the original Greek as a child.¹³⁰

Such remarkable skills, coupled with his father’s demands for attention, generated enviable publicity for the young scholar. Sidis was featured in front-page stories of the *New York Times* nineteen times.¹³¹ In time, however, the press that glorified the child prodigy turned cynical and waited to be the first to predict his burnout. And in many ways, the burnout was inevitable. For all of his brilliance, Sidis was a recluse. At his Harvard graduation, he was said to have told reporters: “‘I want to live the perfect life. . . . The only way to live the perfect life is to live it in seclusion. I have always hated crowds.’”¹³²

Sidis then made various career moves, and failed.¹³³ Eventually, however, he found his place as a law clerk in a New York business firm, where he worked for twenty-three dollars a week.¹³⁴ The job did not require any of the extraordinary talents possessed by Sidis.¹³⁵ He lived a quiet life,

125. Sidis was named for his godfather, the psychologist and philosopher Williams James, who was a friend of Sidis’ father. *Good Will Sidis*, HARVARD MAG., available at <http://www.harvard-magazine.com/issues/ma98/pump.html> (last visited April 24, 2002).

126. *Bent Twig*, Time-Life Books, at <http://www.sidis.net/TimeLife.htm> (last visited Nov. 3, 2002).

127. *Id.*

128. *Id.*

129. *Good Will Sidis*, *supra* note 125, available at <http://www.harvard-magazine.com/issues/ma98/pump.html> (last visited April 24, 2002).

130. *Bent Twig*, *supra* note 126, at <http://www.sidis.net/TimeLife.htm> (last visited Nov. 3, 2002).

131. *Id.*

132. *Good Will Sidis*, *supra* note 125, available at <http://www.harvard-magazine.com/issues/ma98/pump.html> (last visited April 24, 2002).

133. Sidis tried a teaching stint at Rice University but failed. *Id.* He also entered Harvard Law school, but dropped out in his last semester. *Id.*

134. *Id.*

135. *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 807 (2d Cir. 1940).

entertaining himself by collecting streetcar transfers and writing unpublished books.¹³⁶ When the press turned its attention to him in 1937, it pierced Sidis' veil of privacy with a vengeance.¹³⁷ The biographical sketch depicted his lodgings ("a hall bedroom of Boston's shabby south end"), his laugh, and his manner of speech.¹³⁸ All told, it was absolutely merciless. Sidis's subsequent suit against the publisher was based on both invasion of privacy and libel.¹³⁹ The Second Circuit Court of Appeals acknowledged Sidis's constant disdain for the press; yet ruled that Sidis was not entitled to privacy rights because he was still a public figure in 1937—when the one-time child prodigy was thirty-nine years old.¹⁴⁰

[E]ven if Sidis had loathed public attention at that time, we think his uncommon achievements and personality would have made the attention permissible. Since then Sidis has cloaked himself in obscurity, but his subsequent history, containing as it did the answer to the question of whether or not he had fulfilled his early promise, was still a matter of public concern.¹⁴¹

Sidis lost on the invasion of privacy claims, and in 1944 the magazine paid him a reported \$500 to settle a companion suit for malicious libel.¹⁴² Just three months later, Sidis suffered a cerebral hemorrhage and died.¹⁴³ He was forty-six years old.¹⁴⁴ If the public truly had a right to know whether Sidis "fulfilled his [childhood] promise,"¹⁴⁵ it satisfied its curiosity at a demanding

136. *Good Will Sidis*, *supra* note 125, available at <http://www.harvard-magazine.com/issues/ma98/pump.html> (last visited April 24, 2002). Sidis wrote science fiction and a two-volume history of America. *Id.* He also published a book, *The Animate and the Inanimate*, advancing the theory of black holes fifteen years before astronomers advanced it. *Id.*

137. *Sidis*, 113 F.2d at 807.

138. *Id.*

139. *Id.* The suit actually alleged three causes of action: 1) invasion of privacy under the law in California, Georgia, Kansas, Kentucky, and Missouri; 2) infringements of the rights afforded to him under the New York Civil Rights Law; and 3) malicious libel under the laws of Delaware, Florida, Illinois, Maine, Massachusetts, Nebraska, New Hampshire, Pennsylvania and Rhode Island. *Id.*

140. *Id.*

141. *Id.* at 809.

142. *Good Will Sidis*, *supra* note 125, available at <http://www.harvard-magazine.com/issues/ma98/pump.html> (last visited April 24, 2002).

143. *Id.*

144. *Id.*

145. *Sidis*, 113 F.2d at 809.

price. Again, the court improperly failed to allow for the abatement of the plaintiff's public figure status.

IV. ONE MORE TEST

Using the principles asserted in cases that have led to the development of media law, a new test for restoring public figures to private status should be advanced. The test should rely on four factors, most of which have their basis in the seminal cases of *New York Times*, *Curtis Publishing/Associated Press*, and *Gertz*. The factors should include: 1) whether the plaintiff has retreated from the media, or is still actively seeking media attention; 2) whether the plaintiff is involved in a matter that is legitimately a matter of public concern; 3) the plaintiff's access to the media; and 4) the passage of time. By allowing courts to examine these factors, they can more properly determine who is still a public figure. The current policy of "once a public figure always a public figure" unfairly penalizes individuals and essentially robs them of any protection under defamation and privacy laws.¹⁴⁶

"[F]ederal appellate courts generally have been inclined to reject the argument for reversal of public figure status" ¹⁴⁷ Nonetheless, a few courts have discussed, in a limited capacity, the effect time would have on one's public figure status. Even in *Brewer*, for instance, the Fifth Circuit offered this speculation:

It might be that during the "active" public figure period a wider range of articles, including those only peripherally related to the basis of the public figure's fame, are protected by the malice standard and that the passage of time or intentional retreat narrows the range of articles so protected to those directly related to the basis for fame.¹⁴⁸

Nevertheless, the *Brewer* court rejected the plaintiff's argument for public status reversal.¹⁴⁹ Because courts do not properly factor the passage of time into the public figure abatement cases, private individuals have been wrongly held to the difficult standards presented by *New York Times*.

146. Ransom, *supra* note 15, at 411. Although a public figure may still bring an action for defamation or invasion of privacy, the fact is that the "actual malice" standard required by *New York Times* creates nearly insurmountable obstacles for plaintiffs. *Id.*

147. *Id.* at 401.

148. *Brewer v. Memphis Publ'g Co.*, 626 F.2d 1238, 1257 (5th Cir. 1980).

149. *Id.* at 1247-48.

One more media test is needed to aid courts in securing the legal rights of so-called public figures. First, the title "public figure" has been extended by courts to include a wide range of people who hardly meet the standards established in *Gertz*. For instance, "[t]he range of public figures today spans the socioeconomic spectrum"¹⁵⁰ and has been held to include everyone from schoolteachers¹⁵¹ to social workers.¹⁵² "Courts have applied the public figure concept quite loosely, often encompassing plaintiffs whose lives clearly were not public until the defendants' disclosures made them so."¹⁵³ While this concept has aided courts in their efforts to shield defendants from liability, it has made success in privacy actions much more difficult to achieve.¹⁵⁴

As the cases in this article demonstrate, the passage of time usually has little or no effect on public figure status. "With few exceptions, the cases that have dealt with this question have held that once a person's activities become a matter of public interest, the mere lapse or passage of time will not in itself reinstate a person's prior right of privacy"¹⁵⁵ Therefore, those deemed worthy of public figure status might forever lose the legal protection extended to individuals through libel and privacy laws. "Until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains, and victims."¹⁵⁶ Is this a fair trade? As Warren and Brandeis wrote in their now-famous article on privacy more than one hundred years ago: "The right to privacy does not prohibit any publication of matter which is of public or general interest."¹⁵⁷ The sound reasoning behind such limits, however, should not prevent a once-public figure from ever restoring his or her privacy rights.¹⁵⁸

150. Ransom, *supra* note 15, at 390.

151. Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978) (holding that a grade school wrestling coach was a "public figure" within the *New York Times v. Sullivan* standard).

152. Kahn v. Bower, 284 Cal. Rptr. 244 (Ct. App. 1991) (finding that a social worker was a "public official").

153. DeLaTorre, *supra* note 64, at 1164.

154. *Id.*

155. 62A AM. JUR. 2D *Privacy* § 203, at 821-22 (1990).

156. *Id.* at 822.

157. Warren and Brandeis, *supra* note 64, at 214.

158. *Id.*

V. CONCLUSION

A more complete test for restoring public figures to private status is demanded by prevailing public policy concerns. First, the primary factors that make one a public figure according to *Gertz*—the access to the media to rebut false claims and the deliberate assumption of a role in the public eye—are no longer present for those seeking to return to private status through the passage of time. For instance, the plaintiffs in *Brewer*, *Sidis*, and *Friedan* clearly demonstrated their efforts to invoke their rights to be “let alone.” The plaintiffs had not deliberately sought attention from the media; rather, they each had effected a retreat.

Also, society’s rehabilitative goals are not fostered by preventing prisoners who find themselves in the public eye from ever returning to the “privacy” of the general society. As the Supreme Court of California wrote in *Briscoe v. Reader’s Digest*,¹⁵⁹ “[o]ne of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his anti-social acts. In return for becoming a ‘new man,’ he is allowed to melt into the shadows of obscurity.”¹⁶⁰ When the prisoner is wrongly convicted and later released, as in *Bernstein*, the reasons for allowing a prisoner to “melt” into the shadows of obscurity are even more compelling.

Considering how difficult it is for public figures to win defamation and privacy suits, courts should consider the issue of public figure abatement seriously. “Both willing and unwilling public figures are the objects of legitimate public interest during a period of time after their conduct or misfortune has brought them to the public attention.”¹⁶¹ This result is sometimes offensive to both justice and our human sensibilities. Therefore, there is a need for one more test in the media law arena—one that would factor in the passage of time. After all, no one can make time stand still.

159. 483 P.2d 34 (Cal. 1971).

160. *Id.* at 41. As the Supreme Court of California noted in *Melvin v. Reid*: “Even the thief on the cross was permitted to repent during the hours of his final agony.” 297 P. 91, 93 (Cal. 4th Dist. Ct. App. 1931).

161. 62A AM. JUR. 2D *Privacy* § 203, at 822 (1990).

First in Write: Press Rights Prevail Over Privacy Interests in *Bartnicki v. Vopper*

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I. INTRODUCTION

In *Bartnicki v. Vopper*,¹ the Supreme Court faced a direct “conflict between interests of the highest order:” the freedoms of expression secured by the First Amendment and the right to privacy.² Specifically, the Court considered the question of whether the First Amendment shields the press from liability under the federal Wiretapping Act³ for disclosing an illegally intercepted communication received from an outside source.⁴ A divided Court held the Wiretapping Act unconstitutional as applied to the facts of the case.⁵ Though termed “narrow,” the Court’s holding has broad implications.⁶ The headline could read “First In Write: Press Rights Prevail Over Privacy Interests.”

The Supreme Court presents two significant statements in *Bartnicki*. First, confronted with a direct conflict between privacy and First Amendment concerns, the Court once again declares the First Amendment interests first and foremost in importance.⁷ Second, because both sides argue core purposes of the First Amendment, pitting the press freedom to inform the public on matters of public concern against the individual freedom not to speak,⁸ the Court’s holding implicitly, if not explicitly, acknowledges a hierarchy of interests within the First Amendment itself. Thus, in the aftermath of the *Bartnicki* decision, freedom of the press triumphs over both freedom of speech and the right to privacy.

The Supreme Court has repeatedly asserted that the First Amendment does not subject enforcement of a general law against the press to stricter scrutiny than enforcement of the same law against other individuals or entities.⁹ Yet the Court’s decision in *Bartnicki* intimates otherwise. This

1. 532 U.S. 514 (2001).

2. *Id.* at 518.

3. Wire and Electronic Communications Interception and Oral Communications Act, 18 U.S.C. §§ 2510–2520 (1994).

4. *Bartnicki*, 532 U.S. at 517.

5. *Id.* at 535.

6. *Id.* at 517.

7. *See Id.* at 535.

8. *Id.* at 519–20; *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 559 (1985) (holding that the right not to speak serves the same functions as the First Amendment’s affirmative aspects) (citing *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250,255 (N.Y. 1968)).

9. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (asserting that the First Amendment does not protect the press from breaking laws of general applicability). *But see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (distinguishing speech of

article explores the *Bartnicki* holding and argues that the Court's decision implicitly applies stricter scrutiny to the Wiretapping Act as regards the press than as regards others. Part II examines the law prior to *Bartnicki*, both in terms of the First Amendment and the federal wiretapping statute. Part III illuminates the *Bartnicki* decision. Part IV presents an analysis of the *Bartnicki* opinion, focusing on the Court's reasoning and the implications of the holding. Part V demonstrates why the holding subjects Title III to stricter scrutiny when the press is involved. Finally, Part VI concludes that in the aftermath of *Bartnicki*, protection of privacy interests is increasingly dependent upon journalistic ethics.

II. INTERESTS OF THE HIGHEST ORDER: THE LAW BEFORE *BARTNICKI*

In order to assess the significance of the Court's holding, we must examine the law prior to *Bartnicki*. Since the *Bartnicki* Court concludes that application of the federal Wiretapping Act to the facts of the case violated the First Amendment, it is imperative to understand both the statute (hereinafter Title III) and the relevant First Amendment law. This part begins by addressing the First Amendment concerns raised in *Bartnicki*. Then the focus shifts to the sphere of privacy and the protections afforded under Title III. Finally, this part examines the legal interplay between these two "interests of the highest order."¹⁰

A. *The First Amendment*

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."¹¹ Political speech is afforded the broadest protection under the First Amendment because the overriding concern at its inception was ensuring the "free discussion of governmental affairs" essential to democracy.¹² Curtailing this exchange of ideas is thus an inappropriate "means for averting a relatively trivial harm to

media and non-media defendants in a defamation action); *Curtis Publ'g v. Butts*, 388 U.S. 130, 150 (1967) (holding that a newspaper publisher has no special immunity from laws of general applicability to invade rights of others).

10. See *Bartnicki*, 532 U.S. at 518 (referring to freedom of the press and privacy issues).

11. U.S. CONST. amend. I.

12. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

society.”¹³ Accordingly, the courts have declared laws that abridge the freedoms of speech or of the press unconstitutional unless they have concluded that proper justification exists for their enactment.¹⁴

Generally, where the courts have found laws content neutral with only minimal effects on First Amendment freedoms, they have upheld the laws.¹⁵ Content-neutral laws of general applicability “do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”¹⁶ The government can justify incidental restrictions on First Amendment freedoms by showing a sufficiently important interest exists to regulate a “nonspeech” element.¹⁷ The test, first enunciated in *United States v. O’Brien*,¹⁸ is satisfied as long as the law

is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁹

However, the courts have been reluctant to uphold laws directly abridging First Amendment freedoms, especially when issues of public concern are involved. In *Smith v. Daily Mail Publishing Co.*,²⁰ the Supreme Court reviewed recent decisions and declared, “state action to punish the

13. *Whitney v. California*, 274 U.S. 357, 377 (1927).

14. *Id.* Traditionally, courts have applied two levels of scrutiny in determining whether proper justification exists for legislative action abridging these freedoms; intermediate or strict. The standard of review chosen has generally been based on whether or not the law is content based, preferring the tougher standard when content discrimination is present. Where the courts have deemed laws content neutral, they have generally applied intermediate scrutiny. Thus, two distinct lines of cases have emerged, both of which are implicated in *Bartnicki*.

15. If a law discriminates based on content it is subject to strict scrutiny. See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (holding that “a content-based speech restriction . . . can stand only if it satisfies strict scrutiny”) (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). Both *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979), and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), discussed in the immediately following paragraphs, involved content-based restrictions.

16. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

17. *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

18. *Id.* at 377.

19. *Id.*

20. 443 U.S. 97 (1979).

publication of truthful information seldom can satisfy constitutional standards.”²¹ Ultimately, the *Daily Mail* Court held a state statute prohibiting the publication of a juvenile offender’s name unconstitutional as applied by declaring the state’s interest in protecting the child’s anonymity insufficient when weighed against the First Amendment.²² The Court concluded that when the press lawfully obtains truthful information about a matter of public significance, publication of such information is constitutional “absent . . . a state interest of the highest order.”²³

The general rule of *Daily Mail*, commonly referred to as the “*Daily Mail* principle,”²⁴ is now a cornerstone of First Amendment law protecting freedom of the press. In fact, the Court reiterated the principle in *Florida Star*.²⁵ In *Florida Star*, the Court declared a Florida statute making it unlawful to publish the name of a sexual assault victim unconstitutional as applied.²⁶ The Court reasoned that the information was lawfully obtained and the privacy and safety interests asserted by the state were outweighed by the freedoms secured under the First Amendment.²⁷ Quoting directly from *Daily Mail*, the Court cemented the principle: “[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”²⁸ But, in footnote eight of *Florida Star*, the Court specifically reserved the question as to whether the press may publish the same information when acquired unlawfully.²⁹

B. *The Sphere of Privacy: Title III’s Role*

Although the United States Constitution does not explicitly establish an individual right to privacy, the Bill of Rights implies that an individual sphere of privacy exists that the government may not intrude upon.³⁰ Both the legislature and the judiciary have recognized this resulting right,

21. *Id.* at 102.

22. *Id.* at 104.

23. *Id.* at 103.

24. *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989).

25. *Id.*

26. *Id.* at 541.

27. *Id.* at 540–541.

28. *Id.* at 533 (quoting *Smith v. Daily Mail Publ’g Co.* 443 U.S. 97, 103 (1979)).

29. *Florida Star*, 491 U.S. at 535 n.8.

30. Eugene J. Yannon, *Privacy Law*, 34 MD. B.J. 24, 27 Dec. (2001).

described by Warren and Brandeis as the “right to be let alone,”³¹ as an important, if not fundamental, interest.³² The scope of this right, though, is unclear, particularly in light of technological advances that make invasions of privacy easier.³³

Title III protects the individual’s sphere of privacy by making it illegal to intercept, use, or disclose the communications of any person except under specified circumstances.³⁴ Protecting privacy was an overriding congressional concern in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968.³⁵ The legislature made specific findings that technological advances in surveillance techniques increased the danger that private communications “may be open to possible wrongful use and public disclosure by . . . unauthorized private parties.”³⁶ To ensure privacy in communications, Congress deemed it imperative to “strick[e] at all aspects of the problem”³⁷ Accordingly, Title III provides a uniform basis for protecting the privacy interest and broadly prohibits the interception, use, and disclosure of private communications.³⁸

In pertinent part, Title III provides:

- (1) Except as otherwise specifically provided in this chapter any person who –
 - (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; [or]. . . .
 - (c) intentionally discloses or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral or electronic communication in violation of this subsection; [or]

31. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

32. See generally Yannon, *supra* note 30, at 28–29.

33. *Id.* at 26.

34. 18 U.S.C. §§ 2510–2520 (1994).

35. S. REP. NO. 1097 (1968); *reprinted in* 1968 U.S.C.C.A.N. 2112.

36. S. REP. NO. 99-541, at *3 (1986); *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557; see also Brief for Petitioners Bartnicki and Kane, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (No. 99-1687, 99-1728); 2000 WL 1280378, at *17.

37. S. REP. NO. 1097 (1968); *reprinted in* 1968 U.S.C.C.A.N. 2112, 2156; Petitioner’s Brief, Brief for the United States, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (No. 99-1687, 99-1728); 2000 WL 1344079, at *9.

38. Petitioner’s Brief, Brief for the United States, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (No. 99-1687, 99-1728); 2000 WL 1344079, at *5.

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . . shall be punished. . . .³⁹

Title III imposes both civil and criminal penalties on any person in violation of the statute.⁴⁰ Further, it establishes a private cause of action for any person whose communication has been intercepted, used, or disclosed.⁴¹

C. *The Interface Between the First Amendment and Title III*

Title III broadly protects the individual's "right to be let alone"⁴² from interference in private communications. In doing so, it implicates the First Amendment in two critical ways. First, by augmenting the freedom to speak privately, Title III protects the First Amendment freedoms of speech and expression. In this sense, the statute directly fosters First Amendment goals: "privacy of communications is vital to our society" because it allows for the "free interchange of ideas and information."⁴³ By prohibiting the interception, use, and disclosure of private communications, Title III reinforces the First Amendment right not to speak, "which serves the same ultimate end as freedom of speech in its affirmative aspect."⁴⁴

Second, and ironically, Title III's use and disclosure provisions have a potentially chilling effect on the freedoms of speech and the press because they can function like a prior restraint. It is beyond dispute that prior restraints pose the greatest threat to First Amendment freedoms.⁴⁵ Where disclosures about issues of public importance are involved, the concern is heightened since enforcement of Title III stands to directly conflict with the

39. § 2511(1)(a), (c), (d).

40. § 2511(4)–(5).

41. § 2520(a). The statute does not provide a private cause of action for "obtaining" illegally intercepted communications. §§ 2510–2520.

42. Warren & Brandeis, *supra* note 31.

43. *United States v. Cianfrani*, 573 F.2d 835, 856 (3d Cir. 1978).

44. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (citing *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)).

45. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding publication of information of great public concern more important than preserving secrecy that might affect national security in light of the basic rule against prior restraints).

First Amendment's mandate.⁴⁶ Enforcement of these provisions against the press thus inherently raises First Amendment concerns.

"It is beyond question that the First Amendment would not protect the media [or other] defendants from liability . . . [for violating] the interception or procurement prongs of Title III."⁴⁷ Title III's interception provision is clearly constitutional.⁴⁸ Both the press and non-media defendants, however, have challenged the use and disclosure provisions on First Amendment grounds.⁴⁹ Where no significant First Amendment concerns have been raised, the use and disclosure provisions have been uniformly upheld.⁵⁰ But, when the disclosures involved matters of public significance, the courts have been inconsistent in their reasoning and conclusions.⁵¹

Two circuit court cases illustrate the confusion. Both circuit courts overturned the holding and rational of the district court below and both were seeking certiorari from the Supreme Court at the time *Bartnicki* was decided. In *Peavey v. WFAA-TV*,⁵² the Fifth Circuit was presented with a "first impression"⁵³ conflict between the right to privacy arising under Title III and

46. See, e.g., *id.*

47. *Peavy v. Harman*, 37 F. Supp. 2d 495, 516 (N.D. Tex. 1999) *aff'd in part, vacated in part, rev'd in part by*, *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

48. Congressional authority to regulate interstate communications stems from the Commerce Clause and is generally subject to rational basis review; prohibiting interception of private communications is a legitimate state end that is directly advanced by the statute. *Boehner v. McDermott*, 191 F.3d 463, 477 (D.C. Cir. 1999), *vacated on other grounds by* 532 U.S. 1050 (2001).

49. Case law is sparse in this area. Kristine Cordier Karnezis, Annotation, *Construction and Application of Provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2520) Authorizing Civil Cause of Action by Person Whose Wire, Oral, or Electronic Communication is Intercepted, Disclosed, or Used in Violation of Act*, 164 A.L.R. Fed. 139 (2000) (providing an overview of the application of Title III's use and disclosure history).

50. See *id.*

51. See *id.*

52. 221 F.3d 158 (5th Cir. 2000). In an earlier case, *Natoli v. Sullivan*, a New York court determined that a college newspaper could be held liable under Title III for disclosing the transcript of a telephone conversation recorded in violation of the statute even if it had played no role in the illegal interception and the information was of public concern. 606 N.Y.S.2d 504, 507 (Sup. Ct. 1993). The court noted however, that any republication of the transcript by another media source would not violate the statute as the information was then in the public realm and thus did not constitute disclosure. *Id.* at 509.

53. *Peavy*, 37 F. Supp. 2d at 516.

the “right of a free press to publish truthful and newsworthy information.”⁵⁴ The question presented was whether the media defendants could be held liable under Title III for using and disclosing information of public interest that they had obtained from a known third party.⁵⁵ Although the media defendants knew or had reason to know that the information was initially obtained in violation of Title III, they did not make the interceptions themselves.⁵⁶

After an extensive analysis of applicable law, the Fifth Circuit determined that intermediate scrutiny was the proper standard of review and found that Title III’s use and disclosure provisions survived the constitutional challenge.⁵⁷ The court reasoned that Title III is a content-neutral law of general applicability designed to serve the important government interest of privacy in communications and does not burden substantially more speech than necessary in furthering the government’s ends.⁵⁸ The case was remanded, in part to determine issues of fact pertaining to the level of media “participation” in the interceptions.⁵⁹

In *Boehner v. McDermott*,⁶⁰ the District of Columbia Circuit also confronted a direct clash between Title III’s disclosure provision and the First Amendment. In a highly publicized case involving the disclosure and subsequent publication of Speaker of the House Newt Gingrich’s illegally

54. *Id.* at 515. The trial court distinguished the statutory right to privacy arising under Title III from the “constitutional right . . . ‘to be let alone’ from *government* intrusion into personal and intimate decisions and beliefs.” *Id.* at 517. Applying strict scrutiny, the court held Title III unconstitutional as applied to the media defendants who had published truthful information that had been acquired by a third party in violation of the statute. *Id.* The court reasoned “that the information provided to the media involved matters of public significance” and the information was “lawfully obtained by the media.” *Id.* Thus, the trial court found the media’s use and disclosure of the information protected under the First Amendment absent a “state interest of the highest order.” *Peavy*, 37 F. Supp. 2d at 517. The statutory privacy interests violated here, the court explained, could be protected by imposing liability under Title III to the known third party who disclosed the information to the press. *Peavy v. Harman*, 37 F. Supp. 2d 495, 526 (N.D. Tex. 1999). This is ultimately what the Supreme Court held in *Bartnicki*. See discussion *infra* Part III.B.

55. *Peavy*, 221 F.3d at 180.

56. *Id.*

57. *Id.*

58. *Id.* at 193. The court overturned the lower court’s determination that Title III was unconstitutional as applied as well as its use of strict scrutiny as the standard of review. *Id.* at 194. The *Bartnicki* dissent essentially agreed with this court’s reasoning. See discussion *infra* Part III.D.

59. *Peavy*, 221 F.3d at 194.

60. 191 F.3d 463 (D.C. Cir. 1999).

intercepted cellular phone conversation, the circuit court found that it was the defendant's conduct that gave rise to liability under Title III.⁶¹ Even assuming some speech element was present, the court concluded that the less exacting "*O'Brien* framework [was] the proper mode of . . . analysis."⁶² Applying the *O'Brien* test, the court concluded Title III was constitutional as applied to the non-media defendant who had not himself intercepted the conversation but knew it was illegally obtained when he provided it to the press.⁶³ The court, though, distinguished the non-media defendant from the press, indicating that "[w]hether the statute would be constitutional as applied to a newspaper who published excerpts from the tape—who, in other words, engaged in speech—thus raises issues not before us."⁶⁴

When considering the clash between Title III's use and disclosure provisions and the First Amendment, the courts were clearly struggling to find the proper standard of review. Given the importance of these "interests of the highest order," it is not surprising that the Supreme Court granted certiorari in *Bartnicki* to resolve the conflict.⁶⁵

III. *BARTNICKI V. VOPPER*

In *Bartnicki v. Vopper*, the Supreme Court was presented with the issue left unresolved in *Florida Star*, namely the scope of constitutional protection afforded to speech that discloses truthful information of public importance

61. *Id.* at 467.

62. *Id.* The District of Columbia Circuit rejected the lower court's application of the *Daily Mail* principle as well as the finding that the provision violated the First Amendment. *Id.* at 476. The circuit court found the *Daily Mail* and *Florida Star* line of cases inapplicable since the defendant was well aware of the illegality of the tapes when he took possession of them. *Id.*

63. *Boehner*, 191 F.3d at 477–78.

64. *Id.* The court noted that the defendant did not "stand in the shoes of the 'newspaper' in *Florida Star*" and that the defendant's disclosure to the press was not the equivalent of the newspaper's publication. *Id.* at 472. The dissent objected vehemently to this distinction, explaining that "First Amendment protections . . . extend to those who speak and those who write, whether they be press barons, members of Congress, or other sources." *Id.* at 484 (Sentelle, C.J., dissenting). The media was not sued in this case. Karen N. Frederickson, *The Supreme Court, the Press, and Illegally Recorded Cellular Telephone Calls*, HUM. RTS., Fall 2001, at 17, 19 (2001).

65. *Bartnicki v. Vopper*, 532 U.S. 514 (2001). The Supreme Court let the *Peavy* decision stand in the aftermath of *Bartnicki*. *Peavy*, 221 F.3d at 158. At the same time it rendered the *Bartnicki* decision, the Supreme Court vacated and remanded the *Boehner* decision. *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *cert. granted, vacated, and remanded*, 121 S. Ct. 2190 (2001). See discussion *infra* Part IV.B.2.

“unlawfully obtained.”⁶⁶ The actual question the Court considered is a narrower version of *Florida Star*’s footnote eight:⁶⁷ “Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?”⁶⁸ A divided Supreme Court answered “no!”⁶⁹

A. *The Facts*

The facts giving rise to this issue of first impression occurred in the contentious context of local union negotiations.⁷⁰ Petitioner Bartnicki, the chief negotiator for the local school board, called petitioner Kane, president of the local union, from her cellular telephone.⁷¹ They engaged in a lengthy conversation about a proposed strike.⁷² The call was intercepted and recorded by an unidentified person who then anonymously placed the tape in the mailbox of Jack Yocum, head of a local taxpayers organization.⁷³ Yocum recognized the voices on the tape and knowing or having reason to know it was illegally obtained, played the tape for the school board.⁷⁴ He also delivered it to respondent Vopper, a radio commentator known for his criticism of the union.⁷⁵

The unknown source initially made and disclosed the recording in violation of Title III.⁷⁶ The recording contained unsettling remarks made by Kane concerning the school board’s intransigence: “If they’re not gonna move for three percent, we’re gonna have to go to their, their homes . . . To blow off their front porches, we’ll have to do some work on some of those

66. *Bartnicki*, 532 U.S. at 529. The question was also reserved in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978).

67. *Bartnicki*, 532 U.S. at 529 (construing the issue narrowly “consistent with [the] Court’s repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.”).

68. *Id.* at 528 (quoting Justice Sentelle’s dissent in *Boehner*, 191 F.3d at 484–85).

69. *Id.* at 535.

70. *Id.* at 518.

71. *Id.*

72. *Bartnicki*, 532 U.S. at 518.

73. *Id.* at 518–19.

74. *Id.* at 519.

75. *Id.*

76. *Id.* at 523.

guys.”⁷⁷ Though Vopper knew or had reason to know that the conversation had been illegally intercepted, he played excerpts from the tape on his public affairs show.⁷⁸ Subsequently, Vopper and other media sources repeatedly rebroadcast the contents of the tapes.⁷⁹

Bartnicki and Kane filed suit in the United States District Court for the Middle District of Pennsylvania against Yocum, Vopper, and the radio stations, alleging violations of Title III’s use and disclosure provisions and a similar state statute.⁸⁰ The District Court denied cross-motions for summary judgment and then certified two questions for interlocutory appeal to the Third Circuit.⁸¹ First, whether imposing liability on the media defendants for using and disclosing the contents of the illegally intercepted tape violates the First Amendment, and second, whether imposing liability on Yocum for disclosing the tape to the media violates the First Amendment.⁸²

When the Third Circuit Court of Appeals granted review the United States intervened to defend Title III pursuant to statutory right.⁸³ The Third Circuit upheld the lower court’s denial of summary judgment in the Yocum case, but reversed the denial as to the media defendants.⁸⁴ The Third Circuit Court of Appeals reasoned that the wiretapping statutes were content neutral and thus subject to intermediate scrutiny.⁸⁵ But the court determined that both the state and federal statutes “fail the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception.”⁸⁶ The court remanded the case with instructions to grant the media’s motion for summary judgment.⁸⁷ The Third Circuit denied the petitioners’ ensuing motions for rehearing and the Supreme Court granted certiorari.⁸⁸

77. *Bartnicki*, 532 U.S. at 518–19.

78. *Id.* at 519.

79. *Id.*; see discussion *infra* note 52.

80. *Id.* at 514, 519; see discussion *infra* note 52.

81. The questions were certified pursuant to 28 U.S.C. § 1292(b). *Bartnicki*, 532 U.S. at 521.

82. *Id.*

83. See 28 U.S.C. § 2403(a) (2000) (allowing the government to intervene in any action “wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question.”).

84. *Bartnicki v. Vopper*, 200 F.3d 109, 129 (3d Cir. 1999).

85. *Id.* at 123.

86. *Id.* at 129.

87. *Id.*

88. *Bartnicki v. Vopper*, 532 U.S. 514, 522 (2001).

B. *The Opinion*⁸⁹

At the outset, the Court acknowledges this case presents a “conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues—and on the other hand, the interest in individual privacy, and more specifically, in fostering private speech.”⁹⁰ Carefully considering the interests at stake, the Court is “firmly convinced” that the First Amendment affords protection to the respondents’ disclosures.⁹¹ Thus, the question before the Court is whether holding the respondents liable under Title III violates the First Amendment.⁹²

Before addressing this constitutional question, the Court makes three critical assumptions.⁹³ First, the respondents played no role in the interception itself and had no knowledge that it was being made.⁹⁴ Second, though the interception was made in violation of Title III, the respondents lawfully received the information.⁹⁵ Third, the intercepted conversation involved “a matter of public concern” and the disclosed statements were “newsworthy.”⁹⁶

Turning to the constitutional issue, the Court deems Title III a content-neutral statute.⁹⁷ Though characterizing the use provision as a regulation of conduct, the Court finds the disclosure provision a “regulation of pure speech,” analogizing it to the delivery of a pamphlet or a handbill.⁹⁸ Citing the *Daily Mail* principle as well as the primacy of the basic rule against prior

89. Justices O’Connor, Kennedy, Souter, Ginsberg, and Breyer joined in the opinion, written by Justice Stevens. *Id.* at 516. Justice Breyer authored the concurring opinion, joined by Justice O’Connor. *Id.* Chief Justice Rehnquist drafted the dissenting opinion, joined by Justices Scalia and Thomas. *Id.*

90. *Id.* at 518.

91. *Bartnicki*, 532 U.S. at 518.

92. *Id.* at 525. The Court draws “no distinction between the media respondents and Yocum” in this regard. *Id.* at n.8.

93. *Id.* at 525.

94. *Id.*

95. *Bartnicki*, 532 U.S. at 525.

96. *Id.*

97. The Court reasoned that the communications are singled out because they are intercepted; the statute thus distinguishes them “by virtue of the source, rather than the subject matter.” *Id.* at 526.

98. *Id.* at 526.

restraints on publication, the Court concludes that strict scrutiny must be applied.⁹⁹

The Court identifies two government interests supporting Title III: the interest in deterring interceptions and “the interest in minimizing the harm to persons whose conversations have been illegally intercepted.”¹⁰⁰ The Court assumes that these interests justify the disclosure provision when applied to an “interceptor’s own use” or disclosure of information.¹⁰¹ But, the Court asserts it does not follow that “punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving” the same ends.¹⁰²

The Court quickly dismisses the government’s deterrence interest as “plainly insufficient” to prohibit the disclosure of “public information” since the government can better serve this interest by increasing the penalties on interception itself.¹⁰³ It finds the second interest, minimizing harm, considerably stronger since the disclosure of illegally intercepted private communications could serve to inhibit private speech that is essential to the functioning of a democratic society.¹⁰⁴ The Court acknowledges that the disclosure can be more invasive of privacy than the initial interception itself, yet concludes that where sanctions on the publication of truthful information of public concern are involved, privacy must “give way.”¹⁰⁵

The Court cites its opinion in *New York Times v. Sullivan*, reaffirming the “general proposition that freedom of expression upon public questions is secured by the First Amendment.”¹⁰⁶ Recognizing that “neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct,”¹⁰⁷ the Court uses “parallel reasoning” and holds Title III unconstitutional as applied to the facts of the case.¹⁰⁸

99. *Id.* at 527–28 (referring to *New York Times Co. v. United States*, 403 U.S. 713 (1971), where the Court deemed the public’s right to know superior to privacy interests).

100. *Bartnicki*, 532 U.S. at 529.

101. *Id.*

102. *Id.*

103. *Id.* at 532.

104. *Id.* at 532–33.

105. *Bartnicki*, 532 U.S. at 534.

106. *Id.* (citing 376 U.S. 254, 269 (1964)).

107. *Bartnicki*, 532 U.S. at 535 (citing *Bridges v. California*, 314 U.S. 252, 273 (1941)).

108. *Id.*

C. *The Concurring Opinion*

Asserting that the decision does not afford “a significantly broader constitutional immunity for the media,” the concurring Justices stress the narrowness of the Court’s holding.¹⁰⁹ Where competing constitutional interests are at stake, the concurring Justices find the standard of strict scrutiny inapplicable, preferring a balancing approach.¹¹⁰ Balancing the competing right to privacy with the First Amendment, given the specific facts of this case, the concurring Justices nevertheless find Title III unconstitutional as applied.¹¹¹

The concurring Justices stress that Title III’s direct restriction on speech is necessary.¹¹² Since the threat of widespread dissemination creates a powerful disincentive to speak, the government has a substantial interest in broadly prohibiting the interception of private communications.¹¹³ Nevertheless, the concurrence concludes that Title III’s disclosure provision disproportionately burdens freedom of the press under the specific facts of the case.¹¹⁴

Wary of creating a public interest exception to the statute,¹¹⁵ the concurring Justices emphasize that the petitioners “had little or no *legitimate* interest in maintaining the privacy of the particular conversation.”¹¹⁶ The petitioners were contemplating a wrongful act that might have threatened the safety of others.¹¹⁷ Moreover, having voluntarily engaged in a public controversy, the petitioners were “limited public figures.”¹¹⁸ The concurrence stresses that they thus had a more limited interest in privacy than persons discussing purely personal matters “and the public interest in defeating those expectations is unusually high.”¹¹⁹

109. *Id.* at 536 (Breyer, J., concurring).

110. *Id.* (Breyer, J., concurring).

111. *Id.* at 541 (Breyer, J., concurring).

112. *Id.* at 537 (Breyer, J., concurring).

113. *Id.* (Breyer, J., concurring).

114. *Id.* at 538 (Breyer, J., concurring). Justice Breyer fears a broad reading of the case will inhibit legislatures from flexibly responding to advancing technology that threatens privacy. *Id.* at 541 (Breyer, J., concurring). He also urges legislatures to encourage privacy-protecting technology. *Bartnicki*, 532 U.S. at 541 (Breyer, J., concurring).

115. *Id.* at 540 (Breyer, J., concurring).

116. *Id.* at 539 (Breyer, J., concurring).

117. *Id.* (Breyer, J., concurring).

118. *Id.* (Breyer, J., concurring).

119. *Bartnicki v. Vopper*, 532 U.S. 514, 540 (2001) (Breyer, J., concurring).

D. *The Dissenting Opinion*

The dissenting Justices fear that the Court's opinion diminishes the purposes of the First Amendment by inhibiting the speech of millions of Americans, particularly in light of advancing technology.¹²⁰ Finding "scant support, either in precedent or reason" to apply strict scrutiny, the dissent would apply the *O'Brien* test to Title III since it is a content-neutral law of general applicability that serves to foster both the right to privacy and freedom of speech.¹²¹ The dissent distinguishes the *Daily Mail* line of cases because the laws they implicated regulated the content or subject matter of speech.¹²² Moreover, the dissent argues that unlike the laws under scrutiny in the *Daily Mail* line, Title III's disclosure provision does not inhibit publication of information already in the public domain.¹²³ The dissent focuses heavily on the statute's scienter requirement and argues that Title III does not operate as a prior restraint.¹²⁴

Deeming the disclosure provision critical to achieving the government's goals, the dissent thus finds Title III not only content-neutral, but narrowly tailored to prohibit the disclosure of illegally intercepted conversations.¹²⁵ Stressing that the First Amendment also protects the right not to speak, the dissent contends that "[t]he Constitution should not protect the involuntary broadcast of personal conversations" even when the conversants are public figures discussing public matters.¹²⁶ The dissent affords a sphere of privacy to public persons which encompasses the "right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed."¹²⁷ Finding it unfortunate that the Court subordinates this right to

120. *Id.* at 542 (Rehnquist, C.J., dissenting).

121. *Id.* at 544 (Rehnquist, C.J., dissenting).

122. *Id.* (Rehnquist, C.J., dissenting).

123. *Id.* at 546–47 (Rehnquist, C.J., dissenting). The dissent distinguishes *Daily Mail* from the case at bar on three grounds: first, the information there was lawfully obtained from the government itself whereas here, the private conversations have been intentionally kept out of the public domain; second, the information in those cases was available to the public before the media disclosed it; and third, the fear of resulting self-censorship was greater in the *Daily Mail* line because Title III provides a scienter requirement and no duty is imposed on the media to inquire into the source so there is no liability for negligent disclosures. *Bartnicki*, 532 U.S. at 546–47 (Rehnquist, C.J., dissenting).

124. *Id.* at 547 (Rehnquist, C.J., dissenting).

125. *Id.* at 548 (Rehnquist, C.J., dissenting).

126. *Id.* at 554 (Rehnquist, C.J., dissenting).

127. *Id.* at 555 (Rehnquist, C.J., dissenting).

privacy to the freedom of the press, the dissent would hold the statute constitutional as applied to the facts of the case.¹²⁸

IV. ANALYSIS OF THE *BARTNICKI* DECISION

The rule of *Bartnicki* is seemingly clear: absent an “interest of the highest order,” the First Amendment affords the press the right to publish a public figure’s illegally intercepted “speech” on matters of public concern as long as it did not participate in the initial interception.¹²⁹ Prior to *Bartnicki*, the *Daily Mail* principle required courts to make two determinations when publishing truthful information.¹³⁰ “[F]irst, whether the information was lawfully acquired, and second, whether [the publication] addressed a matter of public concern.”¹³¹ *Bartnicki* shifts the focus exclusively to the second question.¹³² It now appears that the only factor limiting the press’s ability to publish truthful information is whether it addresses a matter of public concern.¹³³ This section begins by considering the Court’s reasoning. It then addresses the ambiguities and likely impact of the decision, finding that the rule of *Bartnicki* is not as clear as it seems.

A. *The Court’s Content-Based Decision*

Ironically, in holding a content neutral law of general applicability unconstitutional as applied, the Court focuses on the content of the disclosure itself. The *Bartnicki* decision clearly elevates speech on matters of public concern above other forms of speech protected under the First Amendment.¹³⁴ Ultimately, it also signals the triumph of press freedom over privacy interests.¹³⁵ Yet, a majority of the Court affords greater weight to the right to privacy and freedom of speech than the holding suggests.¹³⁶ Five

128. *Bartnicki v. Vopper*, 532 U.S. 514, 555 (2001) (Rehnquist, C.J., dissenting).

129. Karen N. Frederiksen, *The Supreme Court, the Press, and Illegally Recorded Cellular Telephone Calls*, HUM. RTS., Fall 2001, at 17, 18.

130. *Leading Cases*, 115 HARV. L. REV. 306, 413 (2001).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Paul M. Smith & Nory Miller, *When Can the Courts Penalize the Press Based on Newsgathering Misconduct?*, COMM. LAW., Summer 2001, at 1.

136. *Id.* at 28 (noting that five Justices seem willing to hold the press liable for disclosing the contents of a third party’s “illegal interception if the circumstances are sufficiently different from those presented in this case”).

Justices assert that strict scrutiny is an improper standard of review where privacy interests conflict with the First Amendment.¹³⁷ Clearly, the two concurring and three dissenting Justices are troubled by the Court's reasoning. They have reason to be. The Court's analysis is logically unsound, but will impact the legal interplay between the right to privacy, freedom of speech, and freedom of the press in an era where technological advances increasingly threaten privacy in communications.

1. Pure Speech?

The Court's application of the *Daily Mail* principle is predicated on its assertion that Title III's disclosure provision regulates "pure speech" rather than expressive conduct.¹³⁸ Since the "speech" disclosed by the media involves a matter of public importance, the Court applies the *Daily Mail* principle and renders Title III unconstitutional as applied.¹³⁹ But, it is not clear at the outset that disclosure of an illegally intercepted communication is "pure speech" at all within the meaning of the First Amendment.

The Court determines that a Title III disclosure involves "pure speech" by analogizing the disclosure to the delivery of a pamphlet or a handbill.¹⁴⁰ But the analogy itself is flawed.¹⁴¹ The delivery of a pamphlet or handbill involves the intentional disclosure of its contents by the author or agents of the author.¹⁴² Though the disclosure of illegally intercepted communications likewise provides the recipient the text of the statements, the statements being disclosed are not initially intended for publication.¹⁴³ On the contrary, these communications occur in private and are meant to remain confidential.¹⁴⁴

Simply put, it is illogical to term the media disclosure "pure speech." The broadcast of these communications clearly implicates both the deliberately private speech of the conversant and the intentional conduct of

137. *Id.*

138. *Bartnicki*, 532 U.S. at 527.

139. *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001).

140. *Id.* at 527.

141. *Id.* at 540 (Rehnquist, C.J., dissenting).

142. *Id.*

143. *Id.* at 541; Brief Amicus Curiae Cellular Tel. Indus. Ass'n at *17, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (No. 99-1687), available at 2000 WL 1280461 (providing an in depth analysis of this issue).

144. Even if the petitioners' expectations of privacy were diminished as the concurrence asserts, they never intended the contents of their conversation to be divulged. *Bartnicki*, 532 U.S. at 533.

the press in disclosing it.¹⁴⁵ Disclosing the contents of an illegally intercepted communication is simply not “pure speech” as the Court holds. Nevertheless, the Court finds this “pure speech” concerns a matter of public concern and applies the *Daily Mail* principle. The Court’s foundation for applying strict scrutiny is tenuous.

2. Compelling Speech

As the dissent points out, the First Amendment promotes the voluntary freedoms of expression.¹⁴⁶ The First Amendment was not ratified to coerce Americans to divulge their private conversations.¹⁴⁷ The Supreme Court of the United States recognized this critical distinction in *Harper & Row* when it noted that the right not to speak is not only protected under the First Amendment, but serves the same ultimate purposes as the freedom to speak.¹⁴⁸ Democracy requires that citizens are afforded privacy to think creatively and constructively without fear of exposure.¹⁴⁹ Yet, the *Bartnicki* Court holds that if the press receives information on a matter of public concern from an outside source that broke the law to obtain it, then the press cannot constitutionally be punished for publishing it.¹⁵⁰ *Bartnicki* compels the speech of the victim of the illegal interception.

At the crux of the First Amendment “lies the principle that each person should decide for himself or herself the ideas or beliefs deserving of expression.”¹⁵¹ The Court’s analysis ignores a core purpose of the First Amendment by holding that public persons have abandoned their right to converse privately when discussing matters of public concern.¹⁵² Over a century ago, Justices Warren and Brandeis surmised that as life becomes more complex and civilization advances, privacy becomes more essential to

145. Amicus Brief at *17, *Bartnicki* (No. 99-1687).

146. *Bartnicki*, 532 U.S. at 553.

147. *Id.* at 540.

148. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985).

149. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

150. The Court has upheld press freedom to publish material unlawfully divulged by a source, but in *Bartnicki*, the disclosed information was never in the public domain in the first place, nor was it leaked by a source that rightfully had access to it. *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (distinguishing *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *New York Times Co. v. United States*, 403 U.S. 713 (1971) on the basis of the government’s ultimate authority over the divulged information and the prior restraint imposed).

151. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994).

152. *Bartnicki*, 532 U.S. at 539.

the individual.¹⁵³ Could they ever have imagined the modern threats to privacy in communications? The Court's decision compels speech, diminishes the right to speak privately, and thus undermines an essential element of democratic society that the First Amendment was designed to promote.

3. Ignoring the Facts

The *Bartnicki* Court acknowledges that disclosing "the contents of a private conversation can be an even greater intrusion on privacy than the interception itself."¹⁵⁴ Yet the Court holds that although the media can be held liable under Title III for illegally intercepting a communication, it cannot constitutionally be punished for disclosing that same information unless it was involved in the initial illegality.¹⁵⁵ The Court reaches this conclusion in part by finding that Title III's disclosure provision has no significant deterrent effect on the initial interception.¹⁵⁶ Instead, the Court argues that punishment of the offender is the usual method of deterring unlawful conduct.¹⁵⁷ The Court suggests that the government further its interest in privacy of communications by imposing stiffer sanctions on violations of the procurement prong.¹⁵⁸

While the Court limits the holding to the facts of the case, the Court's outright rejection of the deterrence rationale¹⁵⁹ ignores the facts of the very case it is deciding. In *Bartnicki*, the initial offender is unknown.¹⁶⁰ Imposing stiffer sanctions on the initial offender is meaningless. The government cannot further its objectives by punishing the source. As the dissent argues, preventing the offender "from enjoying the fruits of the crime" is a "time-tested" solution to deterring illegal acts that are difficult to detect.¹⁶¹

153. Warren & Brandeis, *supra* note 31, at 196.

154. *Bartnicki*, 532 U.S. at 533.

155. *Leading Case*, *supra* note 132, at 406, 413.

156. *Bartnicki*, 532 U.S. at 529.

157. *Id.*

158. *Id.*

159. *Id.* at 530.

160. *Id.* at 518.

161. *Bartnicki v. Vopper*, 532 U.S. 514, 550 (2001) (Rehnquist, C.J., dissenting) (citing both the knowing possession of stolen goods and the Fourth Amendment exclusionary rule as examples).

The Court justifies its own dismissal of the facts simply by stating “surely this is [an] exceptional case.”¹⁶² *Bartnicki* may indeed present an unusual set of facts, but this does not excuse the Court from addressing the facts before it. Privacy interests suffer as a result;¹⁶³ permitting the press to disclose the contents of an illegally intercepted communication increases the demand for illegal interceptions. This is especially true on matters of public concern where the interceptor’s primary objective is likely disclosure of the information itself. Failing to address the facts of the case at bar, the Court seriously undermines Title III’s mandate of maintaining privacy in communications.

4. A Tale of Two Evils

The Court’s consideration of the use and disclosure provisions is equally troublesome. While deeming disclosure “pure speech,” the Court expressly states that the use of illegally intercepted communications constitutes conduct.¹⁶⁴ Since laws regulating conduct are generally subject to the less exacting *O’Brien* test,¹⁶⁵ imposing liability on the media for using an illegally intercepted communication is more likely constitutionally permissible than punishing disclosure of the same information. Arguably, the speaker’s sphere of privacy is more directly invaded by a verbatim broadcast of private communications than by the media’s use of the information to investigate a story.

The result is illogical because the Court effectively permits the press to commit the greater of two evils. If Vopper had used the intercepted information as an investigative lead and never disclosed the actual contents on the air, the Court’s reasoning implies that the press could be held liable for violating Title III’s use provision without offending the First Amendment.¹⁶⁶ Yet, the Court holds that punishing Vopper’s verbatim broadcast of the same information violates the First Amendment and is therefore unconstitutional.¹⁶⁷ The Court’s reasoning permits the press to disclose the

162. *Bartnicki*, 532 U.S. at 531.

163. Conflict is created when a “general principle of law is applied to a case, although not applicable to the particular facts of that case.” *Sacks v. Sacks*, 267 So. 2d 73, 75 (Fla. 1972).

164. “Unlike the prohibition against the ‘use’ of the contents of an illegal interception . . . [disclosure] is not a regulation of conduct.” *Bartnicki*, 532 U.S. at 526–27.

165. *United States v. O’Brien*, 391 U.S. 367 (1968).

166. *See* *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999) (labeling Title III’s disclosure provision as conduct and finding it withstands the *O’Brien* test).

167. *Bartnicki*, 532 U.S. at 532.

conversation, while prohibiting it from engaging in the lesser evil of use. In the aftermath of *Bartnicki*, it appears that the media is safer directly invading a public figure's privacy than searching for a less intrusive means of presenting the same story. Surely, the Court could not have intended this illogical result.

The Court's reasoning is illogical and inconsistent. The underlying premise of the Court's opinion, that this disclosure is in fact "pure speech," is not justified. The Court not only fails to acknowledge that the First Amendment is designed to promote the voluntary freedoms of expression, but ignores the facts of the case at bar as well as the contradictory implications of its reasoning. Based on this defective foundation, the Court builds a hierarchy of First Amendment interests, elevating the freedom of the press above the freedom of speech and the right not to speak. By focusing so heavily on the freedom of the press to publish truthful information of public concern, the Court undervalues both the right to privacy and the First Amendment freedom of speech.

B. *Implications of Bartnicki v. Vopper*

The Court's reasoning, flawed as it is, will affect the outcome of future conflicts involving privacy rights and First Amendment freedoms; *Bartnicki* is the law. *Bartnicki* clearly signals a triumph for press freedom to publish truthful information on matters of public concern, but the extent the Court has extended this freedom is unclear.¹⁶⁸ Since the Court leaves important issues unresolved, the effect of the decision is dependent upon judicial interpretation. Although the decision is termed narrow, in an era of advancing technology privacy interests will increasingly collide with freedom of the press and *Bartnicki's* impact is potentially far-reaching.

1. Unresolved Issues

Bartnicki leaves important questions unanswered. The Court makes three critical assertions that render the full significance of the decision unclear; the speakers are public figures, the media had no involvement in and no knowledge of the initial interception, and the information broadcast is of public concern. It is unlikely that future cases will present such pure factual scenarios. The legal interplay between privacy interests and freedom

168. The concurring Justices claim "the Court's holding does not imply a significantly broader constitutional immunity for the media." *Id.* at 536.

of the press is thus dependent upon how the judiciary interprets these factors, including the weight afforded to the concurring opinion.¹⁶⁹

First, the *Bartnicki* holding is predicated on a finding that the speech disclosed was made by public figures. The concurring Justices in *Bartnicki* emphasize that because Bartnicki and Kane are public figures, their privacy expectations are diminished. If the courts give weight to the concurring opinion, the press may be afforded even greater constitutional protection where public officials are involved.¹⁷⁰ Unfortunately, the Court does not address whether the holding governs disclosures of private individual's communications.¹⁷¹ But by the same reasoning, the courts may afford the press less constitutional protection when the speech of private figures is at issue.

Second, the Court assumes that the media had no involvement in or knowledge of the initial interception. Clearly, if the press actively participates in the interception, it can be held liable under Title III's procurement and disclosure prongs. But, the Court does not determine the threshold level of press involvement necessary to trigger liability for disclosure. Can the press be held liable under the disclosure prong while indirectly participating in the initial interception?¹⁷² Is mere knowledge that the interception is taking place sufficient to trigger liability?¹⁷³ *Bartnicki* leaves these questions unanswered. The scope of protection *Bartnicki* affords the press will remain unclear until these issues are litigated.¹⁷⁴

Finally, and perhaps most critically, the Court assumes that the intercepted conversation involves a "matter of public concern."¹⁷⁵ Yet as the dissent points out, "'public concern' is an amorphous concept that the Court does not even attempt to define."¹⁷⁶ The opinion indicates that the speaker's interest in maintaining privacy does not determine whether a matter of public concern exists, but fails to clarify what makes a matter newsworthy.¹⁷⁷

How publicly important must the disclosure be to place the press under the protective umbrella of the decision? The Court notes that domestic

169. Smith & Miller, *supra* note 135, at 29.

170. Frederiksen, *supra* note 129, at 19.

171. *See id.*

172. *See* discussion *infra* Part III.B.2.

173. Frederiksen, *supra* note 129, at 19. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), suggests knowledge is not enough to trigger press liability for publication. Smith & Miller, *supra* note 136, at 30.

174. *See* discussion *infra* Part III.B.2.

175. *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001).

176. *Id.* at 542 (Rehnquist, C.J., dissenting).

177. Smith & Miller, *supra* note 135, at 30.

gossip does not fall within the ambit of the decision, but what if this gossip is about a public official?¹⁷⁸ The Court distinguishes trade secrets from matters of public importance, yet what if the secrets involve illegality?¹⁷⁹ Was the disclosure in *Bartnicki* of simple public importance or, as the concurring Justices argue, of unusual public significance? *Bartnicki* provides no guidance, leaving the line between issues of private and public concern as ambiguous as ever.¹⁸⁰

The Court elevates matters of public concern above other forms of protected speech without presenting coherent guidelines for determining when the holding actually applies to a media disclosure. “[G]iven the malleability of the public concern standard and the ease of ex post explanations” the Court might have effectively answered the one question it repeatedly refuses to answer categorically;¹⁸¹ whether truthful publication may ever be punished consistent with the First Amendment.¹⁸² *Bartnicki* intimates that the press cannot be constitutionally prevented from publishing truthful information, regardless of the source.¹⁸³ But if the concurring rationale is followed, press freedom and privacy interests may be afforded variable protection based on the status of the speaker and the public significance of the disclosed speech.¹⁸⁴

2. Resolution in the Aftermath? *Peavy* and *Boehner*

Shortly after rendering the *Bartnicki* decision, the Court denied certiorari in *Peavy* and granted review in *Boehner*.¹⁸⁵ In the long term, litigation of these and other cases will help resolve the ambiguities of the *Bartnicki* decision.¹⁸⁶ For now, analyzing the Court’s certiorari decisions provides insight into the scope of *Bartnicki*.¹⁸⁷ The Court’s certiorari

178. *Id.* at 28–29.

179. *Id.*

180. *Leading Cases*, *supra* note 132, at 415.

181. *Id.* at 416.

182. *Bartnicki*, 532 U.S. at 527.

183. *Leading Cases*, *supra* note 132, at 416.

184. Concurring opinions can be significant. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring).

185. *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *cert. granted, vacated, and remanded*, 121 S. Ct. 2190 (2001).

186. *Frederiksen*, *supra* note 129, at 18.

187. Having analyzed *Pravda* for many years, this author takes a Kremlinological approach.

decisions suggest three things. First, the threshold question is whether matters of public concern are disclosed. The more newsworthy the matter, the higher the government's interest must be to justify regulation. Second, and related, when the speech disclosed is that of a prominent public official, stricter scrutiny is required. Third, any indication of press entanglement may remove the press from *Bartnicki*'s protective umbrella.

The United States Supreme Court allowed the *Peavy* decision to stand despite the fact that the lower court applied intermediate, rather than strict scrutiny.¹⁸⁸ This seemingly inconsistent denial can perhaps be explained by the possibility that more than "pure speech" is at issue in *Peavy*.¹⁸⁹ Unlike *Bartnicki*, this case implicates the concept of press involvement, requiring a factual analysis of whether the media "obtained" the interceptors.¹⁹⁰ The United States Supreme Court's denial of review may indicate that when the press is involved in the illegal interception, *Bartnicki* does not govern the outcome at all. Perhaps when the media even indirectly "participates" in the initial interception, intermediate scrutiny is sufficient.

After granting certiorari in *Boehner*, the United States Supreme Court vacated the decision below and remanded it for consideration consistent with *Bartnicki*.¹⁹¹ The vacated opinion applied the *O'Brien* test and concluded that Congressman McDermott, a non-media defendant, could be held liable for disclosing an illegally intercepted communication made by a third party to the media.¹⁹² Perhaps the enormous public significance of the disclosure triggered the United States Supreme Court's remand.¹⁹³ Or perhaps it was because the speech disclosed was that of Newt Gingrich, a prominent public official. In either case, the remand in *Boehner* suggests that when matters are of national significance, the *O'Brien* test is an improper mode of analysis. Whether disclosed by the press or by a non-media defendant, speech, not conduct, is at issue.

The remand of *Boehner* may be most significant in that the United States Supreme Court did not reverse the decision below, thereby holding the non-media defendant to the same standard of review as the media defendant in *Bartnicki*. Although the remand indicates that a higher level of scrutiny is required, it does not demand that the First Amendment must

188. *Peavy*, 221 F.3d at 181.

189. Fredericksen, *supra* note 129, at 19.

190. *Id.*

191. *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *cert. granted, vacated and remanded*, 532 U.S. 1050 (2001).

192. The media was not sued. Fredericksen, *supra* note 129, at 19.

193. *Id.*

triumph when the media is not involved. It remains to be seen whether McDermott, a non-media defendant, is immune from liability under Title III like the press, or should be held liable for disclosure under a different rationale.

V. A STANDARD OF ITS OWN?

The Court claims adherence to the general rule that the First Amendment does not subject enforcement of a general law against the press to stricter scrutiny than would be applied to others.¹⁹⁴ In fact, in a one-sentence footnote, the Court asserts that it “draw[s] no distinction between the media respondents and Yocum.”¹⁹⁵ Thus, the Court does not explicitly hold the press to a different standard of review. Yet, if the footnote is read literally, it implies that the disclosure provision is unconstitutional in *every* instance when the initial interception is made by an outside party without press involvement, the disclosure involves a matter of public significance, and the “speech” disclosed is that of a public figure. The Court’s reasoning does not support such a broad reading.

Logic dictates that the Court’s rationale cannot be applied to a non-media defendant’s disclosure. The holding is not only rooted in freedom of the press, but freedom of the press permeates every aspect of the Court’s analysis. The Court tellingly frames the question presented narrowly in order to be consistent with its “repeated refusal to answer categorically whether truthful *publication* may ever be punished consistent with the First Amendment.”¹⁹⁶ Publication is defined as “[t]he act or process of publishing” printed material.¹⁹⁷ Publish means “[t]o prepare and issue (printed material) for public distribution or sale.”¹⁹⁸ When the media institution is not the disclosing party, there is no *publication*, rendering the *Daily Mail* principle inapplicable to the analysis.

Clearly Yocum’s disclosure of the illegally intercepted communication is substantively identical to the media’s, but the form of his disclosure is distinguishable. Although Yocum is exercising his freedom of speech by disclosing information to the media, he is not *publishing* it. His disclosure does not directly implicate the First Amendment freedom of the press.

194. See *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001).

195. *Id.* at 525, n.8.

196. *Id.* at 529 (emphasis added).

197. THE AMERICAN HERITAGE DICTIONARY 628 (Williams Morris ed. 2001). This paper uses the term broadly to include all media disclosures.

198. *Id.*

Yocum's disclosure to the non-media party does not even indirectly implicate press freedom. Though *Bartnicki* does not address the issue of whether the non-media defendant's liability is dependent upon the endpoint of his disclosure, applying the *Daily Mail* principle is clearly inappropriate when there is no publication.¹⁹⁹

In *Curtis Publishing Co. v. Butts*, the United States Supreme Court held that a newspaper publisher has no special immunity from general laws to invade the rights of others.²⁰⁰ Title III is a content-neutral law of general applicability. In *Bartnicki*, the media respondents invaded the petitioners' privacy by disclosing their confidential conversations initially intercepted in violation of Title III. The *Bartnicki* decision subjects Title III to stricter scrutiny when applied to the press than as applied to others because the *Daily Mail* principle is inapplicable when a non-media defendant makes the same disclosure. Implicitly, the decision holds the press to a lesser standard of liability when violating a content-neutral law of general applicability than it does others. The Court has effectively offended its own rule.

VI. CONCLUSION

Bartnicki clearly signals the triumph of freedom of the press over the right to privacy and other freedoms of expression protected by the First Amendment. But *Bartnicki* also demonstrates the importance of the distinction between legality and morality. Though it is now legally permissible for the media to publish a public person's illegally seized speech on a matter of public concern, it is not necessarily morally justifiable to do so. Despite the law, not all journalists would compel speech under the facts of *Bartnicki*.²⁰¹ Fortunately, morality and legality are not one in the same.

Certainly, journalists balanced the public right to know against the individual right to privacy before *Bartnicki*. But as advancing technology increasingly threatens privacy in communications, *Bartnicki* creates an additional ethical dilemma for the media. Currently, many codes of ethics

199. If *Bartnicki* and Kane had sued only Yocum without suing the media, it is difficult to imagine that the Supreme Court would have granted certiorari. Unlike *Boehner*, this case does not involve matters of national significance or the speech of high-level public officials. Although acknowledging that Yocum and McDermott technically stand in the same shoes, the Third Circuit distinguished McDermott's disclosure based on his political motivations and his potential involvement in the initial interception. *Bartnicki*, 200 F.3d at 129.

200. 388 U.S. 130 (1967).

201. Interview with A. Barrett Seaman, Editor Emeritus, Time Magazine, in Ft. Lauderdale, Fla. (Feb. 14, 2002).

neglect to even address privacy interests.²⁰² Competition among journalists can transform a little irresponsibility into a colossal peril for the individual right to privacy. *Bartnicki* proclaims press freedom is first and foremost in importance. Prominence ought to be accompanied by responsibility. Our right to privacy depends on it.

202. Bob Steele, *Codes of Ethics and Beyond*, available at <http://www.poynter.org/research/me/coethics.htm> (Apr. 1999).